TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 658

UNITED STATES OF AMERICA TO THE USE OF NOLAND COMPANY, INCORPORATED, PETITIONER,

vs.

ALEXANDER D. IRWIN AND ARCHIBALD O. LEIGHTON, TRADING AS IRWIN AND LEIGHTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED SEPTEMBER 26, 1941.

CERTIORARI GRANTED NOVEMBER 10, 1941.

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[fol. 1] [Caption omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5554

UNITED STATES OF AMERICA, to the Use of Noland Company, Incorporated, a Corporation, 136 K St., N. E., Washington, D. C., Plaintiff,

vs.

ALEXANDER D. IRWIN and ARCHIBALD O. LEIGHTON, Trading as Irwin & Leighton, 1505 Race St., Philadelphia, Pa.; and United States Guarantee Company, a Corporation, Shoreham Building, Washington, D. C., Defendants

COMPLAINT—Filed January 24, 1940

[fol. 2] 1. Jurisdiction of this cause is conferred by Sections 270 (a) and (b) of Title 40 of the United States Code.

2. On or about the 5th day of December, 1936, the defendants, Alexander D. Irwin and Archibald O. Leighton, partners, trading as Irwin & Leighton, entered into a contract with the United States of America for the furnishing of materials and the performing of work for the construction, including all mechanical equipment, of the Library Building at Howard University, Washington, D. C., in accordance with plans and specifications, Addenda No. 1, and certain alternates, as more fully set out in said contract. The United States required the defendants, Irwin & Leighton, to give the usual penal bond with good and sufficient surety, with the obligation that the said Irwin & Leighton should promptly make payment to all persons supplying labor and material for the prosecution of the work provided for in said contract, and in accordance with and pursuant to the requirement of the said statute, the said defendants, Irwin & Leighton, as principals, and the defendant United States Guarantee Company, a corporation under the laws of the State of New York, as surety; did, on or about the 10th day of December, 1936, make, execute and deliver unto the United States of America, their certain penal bond, signed by them with their genuine signatures and sealed with their seals, wherein they held and firmly bound themselves jointly

and severally unto the United States of America in the penal sum of $408,621 and to which bond a condition was and is annexed as follows:

"Now, Therefore, if the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue."

A certified copy of the said bond is now here to the Court shown.

3. In order to obtain the performance of the work required under the said contract, the defendants, Irwin & Leighton, entered into a sub-contract with Cullen, Inc., a [fol. 3] corporation, for the doing of certain plumbing and heating work necessary to the performance of their contract with the United States. Thereafter this use plaintiff furnished to said Cullen, Inc. plumbing and heating materials for use and which were used in the said work required under the contract between the United States and the defendants Irwin & Leighton. The materials so furnished and delivered were of the total value of $23,649.35 and on account of which there has been paid or allowed by way of credit the total sum of $11,146.80, leaving justly due and owing to the use plaintiff the total sum of $12,502.55, with interest thereon from July 27, 1938.

4. The said Cullen, Inc. promised and agreed to pay the sum of $12,502.55 to the use plaintiff, but has wholly failed so to do.

5. The use plaintiff gave written notice of default in the payment of said sum and made demand upon the defendants, Irwin & Leighton, for the payment of the same. Said notice and demand was made by registered mail, postage prepaid, addressed to the defendants, Irwin & Leighton, at the place where they maintain an office, and was made within 90 days from the date on which the Noland Company furnished and supplied the last of the material for which this claim is made. The notice stated with substantial accuracy the amount claimed and the name of the party to whom the material was furnished. The materials so furnished by the

use plaintiff were necessary in the prosecution of the work which the defendants promised and agreed to perform for the United States, and were accepted by the defendants, Irwin & Leighton, and by the United States of America.

6. The contract between the United States of America and the defendants, Irwin & Leighton, was completed and final settlement had on or about the 6th day of February, 1939, which final settlement was less than one year before the filing of this action.

Wherefore, there is justly due and owing from the defendants, and each of them, to the use plaintiff, Noland Company, Incorporated, the total sum of $12,502.55, with interest thereon from the 27th day of July, 1938.

And the plaintiff to the use of Noland Company, Incorporated, claims of the defendants, and each of them, the [fol. 4] sum of $12,502.55, with interest thereon from July 27, 1938, besides the costs of this suit.

Hinton & Heron, by Alexander M. Heron, Attorneys for Use Plaintiff.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed March 28, 1940

* * * * * * *

The defendants, Alexander D. Irwin and Archibald O. Leighton, individually and as members of the partnership of Irwin & Leighton, and the United States Guarantee Company, move the Court as follows:—

1. To dismiss the action because the complaint filed against them discloses no right or cause of action.

2. To dismiss the action because the Library Building constructed under the contract referred to in the complaint and for and to which plaintiff claims to have supplied materials to one Cullen, Inc., a subcontractor of the prime contractors, is wholly owned in fee by Howard University, a private corporation, is situated upon private property and is not a public building or public works of the United States within the "Miller" Act approved August 24, 1935, (49 Stat. 793) or the "Heard" Act approved August 13, 1894 (28

Stat. 811) as amended by Acts of February 24, 1905, (38 Stat. 811) and March 3, 1911, (36 Stat. 1167); U. S. C. A. Title 40, Secs. 270, 270a.

3. To dismiss the action because of lack of information in the complaint to establish whether said action is based upon the said Miller Act or the said Heard Act as above cited.

Prentice E. Edrington, Attorney for Defendants.

[fol. 5] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

No. 5554

UNITED STATES for the Use and Benefit of Noland Company, Incorporated, Plaintiff,

v.

IRWIN & LEIGHTON, et al., Defendants

No. 5443

UNITED STATES for the Use and Benefit of Powers Regulator Co., a Corporation, Plaintiff,

IRWIN & LEIGHTON, et al., Defendants

No. 5798

UNITED STATES for Use and Benefit of Englehaupt & Co., Plaintiffs,

v.

IRWIN & LEIGHTON, et al., Defendants

MOTION TO CONSOLIDATE—Filed April 1, 1940

On motion of Alexander D. Irwin and Archibald O. Leighton, individually and as members of the partnership of Irwin & Leighton, and United States Guarantee Company, defendants in the three above entitled and numbered causes, and on showing to the Court that the complaint in each of the said suits allege that the plaintiffs in suit, respectively, are sub-subcontractors of one Cullen, Inc., for

whom their furnished material and/or labor in connection with the construction of a Library Building for Howard University in the District of Columbia; that said Cullen, Inc., was a subcontractor of the prime contractors, Irwin & Leighton; that defendant, United States Guarantee Com-
[fol. 6] pany is the surety on the payment bond given in connection with the general contract.

That identical motions to dismiss have been filed in each of the three above entitled causes; that the issues are identical and that said causes should be consolidated for the purpose of the trial of said motions to dismiss filed in each of said cases.

Wherefore, mover prays that the above entitled and numbered causes be ordered consolidated for the purpose of the trial of the motions to dismiss, and for general and equitable relief.

Prentice E. Edrington.

We take notice of the above motion and consent thereto.

Alexander M. Heron, Attorney for Noland Company, Inc. No. 5554, Attorney for Powers Regulator Co. No. 5443; Robert Ash, Attorney for Englehaupt & Co., No. 5798.

In United States District Court

Order for Consolidation—Filed April 1, 1940

(C. A. 5554-5443-5798)

Upon consideration of the motion of the defendants in each of the above entitled actions, to consolidate the hearings on the motions to dismiss filed therein, it is, by the Court, this 1st day of April, 1940,

Ordered that the hearings on the motions to dismiss each of the above entitled actions be, and the same hereby are, consolidated to be heard together in the suit entitled, "United States for the use and benefit of Noland Company, Incorporated, vs. Irwin & Leighton, et al., Civil Action No. 5554."

Jesse C. Adkins, Justice.

Consented: Hinton & Heron, by Alexander M. Heron, Attorneys for Use Plaintiff.

[fol. 7] IN UNITED STATES DISTRICT COURT

JOURNAL ENTRY OF ARGUMENT AND SUBMISSION OF MOTION TO DISMISS—June 25, 1940

Motion to dismiss (treated as motion for summary judgment) argued & submitted.

IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION OVERRULING MOTION TO DISMISS—Filed June 26, 1940

(Civil Action No. 5554)

While Congress may not perhaps by its mere fiat make that a public work which is not a public work, I have no doubt that it may require a bond to be given to protect material men and others furnishing material or labor under any contract under which the money of the United States is to be spent. So far as the meaning of the words "public work" is concerned, I see no difference in the Hurd and Miller Acts taken in themselves, but taken in connection with the acts of February 14, 1931 and June 16, 1933 and the proceedings before the House Committee on the judiciary and the reports of the committee, I think it was the intention of Congress to include within the provisions of the Miller Act contracts for work such as that involved in this suit.

In view of this, I do not think that the case of Maiatico Construction Company vs. United States, 65 App. D. C., 62 is applicable.

The motion to dismiss should be overruled.

BAILEY, J.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION TO DISMISS—Filed June 28, 1940

(Civil Action No. 5554)

Upon consideration of the motion of the defendants to dismiss this action, the depositions and exhibits offered in

evidence in connection with the hearing thereof, and argu- [fol. 8] ment of counsel, it is, by the Court, this 28th day of June, 1940,

Ordered that the said motion be, and the same hereby is, overruled for the reasons set out in the opinion of the Court filed herein on June 26, 1940.

Jennings Bailey, Justice.

No objection as to form. Prentice E. Edrington, Attorney for Defendants.

IN UNITED STATES DISTRICT COURT

EXCEPTION TO THE ORDER DISMISSING DEFENDANTS' MOTION TO DISMISS AND FOR STAY—Filed July 2, 1940

(C. A. 5554-5798-5443)

Now come the defendants for the purpose of excepting to the action, ruling and opinion of the Court herein filed on June 26, 1940,

(1) In holding that "it (Congress) may require a bond to be given to protect material men and others furnishing materials and labor under any contract under which the money of the United States is to be spent" when no such action has been taken by the Congress.

(2) In holding that the words "public buildings and public works" of the United States provided by the Miller Act approved August 24, 1935, taken in connection with the Acts of July 14, 1931 and June 16, 1933, and the proceedings before the House Committee on the Judiciary and the reports of the Committee "showed the intention of Congress to include within the provisions of the Miller Act contracts for work such as involved in suit," when such proceedings appear to indicate no such intention.

(3) In holding that the case of Maiatico Construction Company vs. United States, 65 App. D. C. 62, is not applicable to the issues presented.

(4) In not holding that the Library Building constructed by defendants Irwin & Leighton was not a public building or public works of the United States within the meaning of

the Miller Act and that the Court had no jurisdiction in a [fol. 9] suit in the name of the United States for the use and benefit of the plaintiffs on the bond given pursuant to the said Miller Act.

(5) In denying the Motion to Dismiss filed by the defendants and overruling the same.

(6) Defendants are aggrieved by said opinion and ruling of the Court in the above-entitled and numbered consolidated cases and intend to promptly apply by petition to the Court of Appeals for the District of Columbia for an order of special appeal.

(7) In the interim until the said Court of Appeals of the District of Columbia acts upon said petition for special appeal, defendants ought not to have to answer because the allowance of the special appeal and the holding of the Court of Appeals that any or all of the grounds of appeal are well founded finally disposes of each and every one of the three causes of action above named, and defendants ask for an order staying all further proceedings in these cases pending the final disposition of said special appeal.

Wherefore defendants pray for such order as is just and proper in the premises, and for general and equitable relief.

A. M. Holcombe, Prentice E. Edrington, Attorneys for Defendants.

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, OCTOBER TERM, 1940

No. 3303. Original

Civil Action No. 5554

IRWIN & LEIGHTON, et al., Petitioners,

vs.

UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF NOLAND CO., INC.

ORDER ALLOWING SPECIAL APPEAL—Filed October 24, 1940

On consideration of the petition for allowance of a special appeal from the order of the District Court of the [fol. 10] United States for the District of Columbia entered

June 28, 1940, in the above entitled cause by Mr. Justice Jennings Bailey,

It is ordered by the Court that the petition be, and it is hereby, granted, and a special appeal allowed as prayed.

Per Mr. Chief Justice Groner. (Seal.)

October 22, 1940.

A true Copy. Test: Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia.

In United States District Court

Order re Depositions and Exhibits—Filed November 6, 1940

It is ordered this 6th day of November, 1940, that the original depositions and exhibits of record offered and filed by the plaintiff and defendants be sent to the Court of Appeals for the District of Columbia in lieu of copies thereof as designated by counsel for appellants and appellee.

Jennings Bailey, Justice.

Consent: Prentice E. Edrington, Attorney for defendants and appellants. Alexander M. Heron, Attorney for plaintiff and appellee.

In United States District Court

Defendants' and Appellants' Designation of the Record—Filed October 29, 1940

(Civil Action No. 5554)

To the Clerk of the United States — for the District of Columbia:

Please take notice that Irwin & Leighton and the United States Guaranty Company, defendants herein, granted a [fol. 11] special appeal by the Court of Appeals for the District of Columbia, by order dated October 22, 1940, filed with you in the above numbered and entitled cause, hereby designate the following portion of the record for inclusion in the Transcript of Record on appeal:

1. Complaint filed January 24, 1940.
2. Motion to Dismiss filed March 28, 1940 (excluding notice of Motion and points and authorities).

3. Defendants' Motion for leave to consolidate filed April 1, 1940.

4. Order of Consolidation dated April 1, 1940, and filed April 1, 1940.

5. Payment bond dated December 10, 1936, with Irwin & Leighton as principals and United States Guaranty Company as surety (pages A12, A13, and A14 of Exhibit Noland 1, filed October 29, 1940).

6. Depositions of Floyd E. Dotson and John J. Madigan, filed May 2, 1940.

7. Plaintiff's Exhibit 2 Madigan, being photostatic copy of title page of bulletin No. 51, revised October 1, 1935, attached to the depositions of Dotson and Madigan filed May 2, 1940, and referred to in the testimony of witness Madigan at page 13.

8. Testimony of Dr. Mordecai W. Johnson and Virginius D. Johnston, filed June 18, 1940.

9. Booklet entitled "Act of Incorporation (as amended to May 13, 1938) and By-laws of the Board of Trustees of Howard University, in the District of Columbia" revised April 14, 1936, marked Defendants' Exhibit Johnson 4.

10. All of article 17, page A-6 of the contract between the United States and Irwin & Leighton, exhibit Noland 1, filed October 29, 1940.

11. All of paragraph G-12, page 26 of document entitled "Proposal and Specifications for the Construction and Equipment of the Library Building, Howard University, Washington, D. C." approved October 15, 1940, attached to and made part of exhibit Noland 3, filed October 29, 1940.

12. The Act of Congress approved August 24, 1935 (Public No. 321, 74th Congress) H. R. 8519, attached to and forming part of proposal and specifications for construction and equipment of Library Building, Howard Uni-
[fol. 12] versity, at Washington, D. C. Exhibit Noland 3, filed October 29, 1940.

The Clerk is requested in certifying this exhibit to note it is attached to said specification and bid data and forms part thereof.

13. Report of hearings before the Committee on the Judiciary, House of Representatives, 74th Congress, First Session, March 8-22, April 26, May 3, 1935, marked Exhibit Noland 4, filed October 29, 1940.

14. Report No. 1263, 74th Congress, First Session, House of Representatives, to accompany H. R. 8519, marked Exhibit Noland 5, filed October 29, 1940.

15. Memorandum of Opinion of Mr. Justice Bailey, filed June 26, 1940.

16. Order dismissing Motion to Dismiss signed by Mr. Justice Bailey, filed 28 June 1940.

17. Defendants' exceptions to the order dismissing Motion to Dismiss and points filed by defendants July 2, 1940.

Amasa M. Holcombe, Prentice E. Edrington, Attorneys for Defendants and Appellants.

Copy of the above designation of record mailed to attorneys for plaintiff and appellee this 29th day of October, 1940.

Prentice E. Edrington, Attorney for Plaintiff and Appellee.

IN UNITED STATES DISTRICT COURT

COUNTER-DESIGNATION OF PLAINTIFF-APPELLEE—Filed November 2, 1940

Colnes Noland Company, Incorporated, plaintiff-appellee in the above entitled action, and designates parts of the record to be included in the transcript in addition to those designated by the defendants-appellants, such additional parts being deemed necessary and material for a determination of the questions raised on appeal, namely:

1. Memorandum of docket entry of June 25, 1940, showing motion to dismiss treated as motion for summary judgment.

2. Memorandum that Plaintiff's Exhibit No. 1 attached [fol. 13] to depositions of Dotson and Madigan filed May 2, 1940, is identical with Federal Emergency Administration of Public Works Bulletin No. 51 attached to Plaintiff's Exhibit No. 3.

3. Defendants' Exhibit No. 1-A attached to the depositions of Johnson and Johnston filed June 18, 1940.

4. Noland Company Exhibit No. 1 filed October 29, 1940, being the contract between the defendants, Irwin & Leigh-

ton, and the United States, omitting therefrom Articles 2 to 9, inclusive, Articles 13, 20, 21 and 26 to 32, inclusive, together with all matter subsequent to the signature of the parties thereto.

5. Noland Company Exhibit No. 2 filed October 29, 1940, being the performance bond of Irwin & Leighton, pages 1 and 2 only.

6. Noland Company Exhibit No. 3, filed October 29, 1940, the following portions only;

(a) Memorandum for the Assistant Secretary, dated March 13, 1940.

(b) Proposal and specifications for the construction and equipment of the Library Building at Howard University, Washington, D. C., from which the following portions are to be included:

Bulletin No. 51 Federal Emergency Administration of Public Works, title page, Sections 1 to 5, inclusive, Section 8.

Division No. 1, Section 1, specifications, General Conditions, Note—; paragraph G-3; paragraph G-8; paragraph G-10; paragraph G-32; paragraph G-51.

7. And this counter-designation.

November 2, 1940.

Hinton & Heron. By Alexander M. Heron, *Attorneys for Plaintiff-Appellee.*

I certify that a copy of the foregoing designation was served upon Messrs. Amasa M. Holcombe and Prentice E. Edrington, by mailing the same addressed to them in the Munsey Building, Washington, D. C., this 2d day of November, 1940.

Alexander M. Heron.

[fol. 14] Clerk's Certificate to foregoing transcript omitted in printing.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT NOLAND #1, Filed October 29, 1940

This Contract, entered into this 5th day of December, 1936, by The United States of America, hereinafter called

the Government, represented by the contracting officer executing this contract, and Irwin and Leighton, a corporation organized and existing under the law of the State of a partnership consisting of Alexander D. Irwin and Archibald O. Leighton, trading as Irwin and Leighton an individual trading as of the city of Philadelphia, in the State of Pennsylvania hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

Article 1. *Statement of work.*—The contractor shall furnish the materials, and perform the work for the construc-[fol. 15] tion (including all mechanical equipment) of the Library Building at Howard University, Washington, D. C. in accordance with plans, specifications, and Addenda No. 1; also subject to acceptance of Alternates Nos 1, 3, 4, 6; 9, 14, 15, 16, 23, 26, 28, 35, 43, 47, *52, and **52, forming a part hereof.

*Alternate No. 52, Irwin & Leighton Proposal No. 1 reads:

"If it is decided by the Government to eliminate one or more stack aisles outlets complete, comprising box, reflector, lamp and connections, the unit price deduction for each such omission will be $6.00 each"

Under this alternate 348 such stack outlets, etc., are eliminated from the Ground Floor Mezzanine stacks; the First Floor stacks; the First Floor Mezzanine stacks; and the Second Floor Mezzanine "A" stacks—making a deduction of 348 x $6.00, that is $2,088.00.

**Under this same alternate No. 52,252 stack outlets, etc., are eliminated from the Ground Floor, making a deduction of 252 x $6.00, that is $1,512.00, for the consideration of Eight hundred and seventeen thousand, Two hundred and twenty five, ($817,225.00) Dollars; in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof, and designated as follows:

Plans and specifications approved by Department October 15, 1934, with Addenda No. 1.

Proposal of contractor, October 14, 1936, and Postal telegram of October 14, 1936.

The work shall be commenced within ten calendar days after receipt of notice, and shall be completed within three hundred and twenty five calendar days from that date.

Art. 10. *Permits and care of work.*—The contractor shall, without additional expense to the Government, obtain all

required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

Art. 11. (*a*) *Convict labor.*—No convict labor shall be employed on the project and no materials manufactured or [fol. 16] produced by convict labor shall be used on the project unless required by law.

(*b*) *Thirty-hour week.*—Except in executive, administrative, and supervisory positions, so far as practicable and feasible in the judgment of the contracting officer, no individual directly employed on the project shall be permitted to work more than 30 hours in any 1 week: *Provided*, That this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any 1 week to be made up in the succeeding 20 days.

(*c*) *Eight-hour law.*—No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than 8 hours in any 1 calendar day upon such work at the site thereof. For each violation of the requirements of this article a penalty of $5 shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than 8 hours upon said work, and all penalties thus imposed shall be withheld for the use and benefit of the Government: *Provided*, That this stipulation shall be subject in all respects to the exceptions and provisions of United States Code, title 40, sections 321, 324, 325, and 326, relating to hours of labor.

Art. 12. *Covenant against contingent fees.*—The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by con-

tractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

Art. 14. *Officials not to benefit.*—No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be [fol. 17] construed to extend to this contract if made with a corporation for its general benefit.

Art. 15. *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

Art. 16. *Payments to contractors.*—(*a*) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration.

(*b*) In making such partial payments there shall be retained 10 per cent on the estimated amount until final completion and acceptance of all work covered by the contract: *Provided, however,* That the contracting officer, at any time after 50 per cent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: *And provided further,* That on completion and acceptance of each separate building, vessel, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, including retained percentages thereon, less authorized deductions.

(*c*) All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the contractor from the sole responsibility for the care and protection of materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the contract.

[fol. 18] (*d*) Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

(*e*) The contracting officer may withhold from the contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed by the contractor or any subcontractor on the work, the difference between the rate of wages required by this contract to be paid to laborers or mechanics on the work and the rate of wages actually paid to such laborers or mechanics.

Art. 17. *Additional security.*—Should any surety upon the bond for the performance of this contract become unacceptable to the Government, or if any such surety shall fail to furnish reports as to his financial condition from time to time as requested by the Government, the contractor must promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by the contract.

Art. 18. *Wages.*—(*a*) All employees directly employed on this work shall be paid just and reasonable wages, which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort. The contractor and all subcontractors shall pay not less than the minimum hourly wage rates for skilled and unskilled labor as follows:

Skilled labor, ...
Unskilled labor, ...

(*b*) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work shall be posted in a prominent and easily accessible place at the site of the work, and the contractor shall keep a true and accurate record of the hours worked by and the wages paid to each employee and shall furnish the contracting officer [fol. 19] with a sworn statement thereof on demand. All employees shall be paid in full not less often than once each week and in lawful money of the United States in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process.

(*c*) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on March 1, 1935, shall be above the minimum rates specified above, such agreed wage rates shall apply.

(*d*) The above designated minimum rates are not to be used in discriminating against assistants, helpers, apprentices, and serving laborers who work and serve skilled journeymen mechanics and who are not to be termed as "unskilled laborers."

(*e*) The minimum wage rates herein established shall be subject to change by the Administrator on recommendation of the Board of Labor Review. In the event that, as a result of fundamental changes in economic conditions, the Administrator, acting on such recommendation, from time to time establishes different minimum wage rates (referred to in article 18 (*a*) and (*d*) hereof) all contracts for work on the project shall be adjusted accordingly by the parties thereto so that the contract price to the contractor under any contract or to any subcontractor under any subcontract shall be increased by an amount equal to any such increased cost, or decreased in an amount equal to such decreased cost.

(*f*) The Board of Labor Review shall hear all labor issues arising under the operation of this contract and as may result from fundamental changes in economic condi-

tions during the life of this contract. Decisions of the Board of Labor Review shall be binding upon all parties.

Art. 19. (*a*) *Labor preferences.*—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of [fol. 20] the political subdivisions and/or county in which the work is to be performed and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the State, Territory, or district in which the work is to be performed: *Provided,* That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates, and preference shall be given to those unemployed at the date of registration who, at the date of selection, have no other available employment.

(*b*) *Employment services.*—To the fullest extent possible, labor required for the project and appropriate to be secured through employment services shall be chosen from the lists of qualified workers submitted by local employment agencies designated by the United States Employment Service: *Provided, however,* That union labor, skilled and unskilled, shall not be required to register at such local employment agencies but, if such labor is desired by the employer, shall be secured in the customary ways through recognized union locals. In the event, however, that employers who wish to employ union labor are not furnished with qualified union workers residing in the locality by the union locals which are authorized to furnish such labor, within 48 hours (Sundays and holidays excluded) after request is filed by the employer, all labor shall be chosen from lists of qualified workers submitted by local agencies designated by the United States Employment Service. In the selection of workers from lists prepared by such employment agencies and union locals, the labor preferences provided in section (a) of Article 19 shall be observed.

(*c*) *Collective bargaining.*—Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives

or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.

[fol. 21] ART. 22. *Persons entitled to benefits of labor provisions.*—The contractor will extend to every person who performs the work of a laborer or of a mechanic on the project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the contractor and such laborer or mechanic, or between any subcontractor and such laborer or mechanic.

ART. 23. *Inspection of records.*—The Federal Emergency Administrator of Public Works and the contracting officer, through their respective authorized agents, shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract.

ART. 24. *Reports.*—The contractor will report monthly, and will cause all subcontractors to report in like manner, within 5 days after the close of each calendar month, on forms to be furnished by the Department of Labor, the number of persons on their respective pay rolls, the aggregate amount of such pay rolls, the man hours worked, and the total expenditures for materials. He shall furnish to the Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable, provided that the foregoing shall be applicable only to work at the site of the con-truction project.

ART. 25. *Termination for breach.*—In the event any of the provisions of articles 7 (*b*), 11, 18-24, 26, of this contract are violated by the contractor or any subcontractor on the work, the contracting officer may terminate the contract by written notice to the contractor. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby; and the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor.

[fol. 22] In witness whereof the parties hereto have executed this contract as of the day and year first-above written.

The United States of America, by Oscar L. Chapman, Assistant Secretary (Official title). Irwin & Leighton, Contractor, by Archibald O. Leighton (Member of Firm), 1505 Race St., Phila., Pa. (Business Address.)

Two witnesses: C. A. Townsend, Jos. Killey.

Payment Bond

(Construction)

Pursuant to the Act of Congress, Approved August 24, 1935, 49 Stat. 1011

Know all Men by these Presents, That we, Irwin and Leighton, 1505 Race Street, Philadelphia, Pennsylvania, a partnership consisting of Alexander D. Irwin and Archibald O. Leighton, trading as Irwin and Leighton in the City of Philadelphia, as Principal, and United States Guarantee Company, a corporation of the State of New York, as Surety are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of Four hundred and eight thousand, six hundred and twelve ($408,612.00) dollars for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of this Obligation is such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated December 5th, 1936, for furnishing all labor and materials required for the construction (including all mechanical equipment) of the Library Building at Howard University, Washington, D. C., in ac-[fol. 23] cordance with plans, specifications, and Addenda No. 1, forming a part thereof.

Approved:

Oscar L. Chapman, Assistant Secretary.

Now, Therefore, If the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said con-

tract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals this 10th day of December, 1936, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

Irwin & Leighton, by Alexander D. Irwin (Individual principal). (Seal.) By Archibald O. Leighton, 1505 Race St., Phila., Pa. (Seal.)

In presence of—

C. A. Townsend, 1505 Race St., Phila. (Address).

Jos. Killey, 120 Fox St., Rockledge, Pa. (Address).

United States Guarantee Company (Corporate surety), 90 John St., New York City, N. Y. (Busi- [fol. 24] ness address), by Joseph H. Williams (Affix Corporate Seal), Pauline H. Selzer, Attorneys-in-fact.

Violet E. Lear, Witness.

The rate of premium on this bond is

Total amount of premium charged, $

See Performance Bond.

Endorsed: Jan. 19, 1937. Treasury Department, Office of the Secretary, Commissioner of Accounts and Deposits. Section of Surety Bonds. Examined and recorded: The within corporate surety is duly qualified and evidence of the authority of the officers or agents signing on its behalf is on file in this office. D. W. Bru, Assistant to the Secretary.

Instructions

1. This form, for the protection of persons supplying labor and material, shall be used in connection with all contracts exceeding two thousand dollars in amount, for the construction, alteration, or repair of any public building or public work of the United States. There shall be no deviation from this form except as authorized by the Director of Procurement.

In United States District Court

"Plaintiff Exhibit Noland 2—Filed October 29, 1940"

Performance Bond

(Construction or Supply)

Know all Men by these Presents, That we, Irwin and Leighton, 1505 Race Street, Philadelphia, Pennsylvania, a partnership consisting of Alexander D. Irwin and Archibald O. Leighton, trading as Irwin and Leighton in the City of Philadelphia, as Principal, and United States Guarantee Company, a corporation of the State of New York as Surety, are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of Four hundred and eight thousand, six hundred and twelve ($408,612.00) dollars for the payment of which sum well and truly to be made, we bind ourselves, our heirs, [fol. 25] executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of this Obligation is such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated December 5th, 1936, for furnishing all labor and materials required for the construction (including all mechanical equipment) of the Library Building at Howard University, Washington, D. C., in accordance with plans, specifications, and Addenda No. 1, forming a part thereof.

Approved:

Oscar L. Chapman, Assistant Secretary. WHH.

Now therefore, If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Government, with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then, this obligation to be void; otherwise to remain in full force and virtue.

In witness whereof, the above-bounden parties have executed this instrument under their several seals this 10th day of December, 1936, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

Irwin & Leighton, by Alexander D. Irwin (Seal), by Archibald O. Leighton, 1505 Race St., Phila, Pa. (Seal).

[fol. 26] In presence of—
C. A. Townsend, 1505 Race St., Phila.
Jos. Killey, 120 Fox St., Rockledge, Pa.

United States Guaranty Company, 90 John St., New York City, N. Y., by Joseph H. Williams, Pauline H. Selzer, Attorneys-in-fact. (Affix Corporate Seal.)

Violet E. Lear.

The rate of premium on this bond is 1% on C. P.
Total amount of premium charged, $8,172.25.

Instructions

1. This form shall be used for construction work or the furnishing of supplies, whenever a bond is required. There shall be no deviation from this form except as authorized by the Director of Procurement.

In United States District Court

"Plaintiff Exhibit Noland 3—Filed October 29, 1940"

Endorsed: Interior Department. Received Mar. 14, 1940. Assistant Secretary.

Objected to as an interdepartmental communication and inadmissable as such.

Prentice & Carrington for defts.

United States
Department of the Interior
Office of the Solicitor
Washington

Mar. 13, 1940.

Memorandum for the Assistant Secretary.

I have received your memorandum dated January 27 in which you request advice as to whether, in view of the de-

cision of the court in the case of Maiatico Construction Co. v. United States, 65 App. D. C. 62, the usual performance [fol. 27] and payment bonds should be required in connection with the contract for installation of card catalogue cases in the library building at Howard University and whether it is necessary to request a predetermination of wage rates by the Secretary of Labor in accordance with the Davis Bacon Act (49 Stat. 1011).

The act of August 24, 1935 (49 Stat. 793), requires contractors for the construction, alteration or repair of "any public building or public work of the United States" to furnish performance and payment bonds where the contract exceeds $2,000 in amount. The United States Court of Appeals for the District of Columbia held in the case of Maiatico Construction Co. v. United States, 65 App. D. C. 62, that the dormitory buildings at Howard University, constructed with funds appropriated for that purpose by Congress, were not "public buildings" or "public works" within the meaning of the Heard Act (49 U. S. C. 270), the bond statute then in effect. The existing bond statute (act of August 24, 1935) as shown above also relates to "public buildings" and "public works." It appears, accordingly, that the decision of the court in the Maiatico case is applicable to the existing statute.

It is not believed, however, that the Maiatico decision is controlling in connection with the construction of the library building at Howard University. The dormitory buildings involved in the Maiatico decision were constructed with funds appropriated by Congress expressly for that purpose (44 Stat. 971, 45 Stat. 904, 46 Stat. 324) and in so doing Congress did not render their expenditure subject to the bond statute. In the case of the library building the construction is being conducted with National Industrial Recovery Act funds allocated by the Federal Emergency Administrator of Public Works (see letter dated October 28, 1933). Pursuant to authority vested in him by the act, the Federal Emergency Administrator of Public Works has specified that the expenditure of such funds shall be subject to the bond statute (see Bulletin No. 51, Federal Emergency Administration of Public Works).

It is my opinion, therefore, that the usual performance and payment bonds should be required in connection with

the contract for the installation of card catalogue cases in the library building at Howard University, which, it is stated, will exceed $2,000 in amount.

[fol. 28] The Davis Bacon Act (act of August 30, 1935, 49 Stat. 1011), also relates only to contracts concerning "public buildings" and "public works." The Federal Emergency Administrator of Public Works, moreover, has rendered this statute applicable to contracts involving National Industrial Recovery Act funds which are in excess of $2,000 in amount and "are for the construction, alteration, and/or repair, including painting and decorating, of a *public building* or *public work* within the geographical limits of the States of the Union or the District of Columbia." (Emphasis supplied.) The applicability of the Davis Bacon Act to the proposed contract, therefore, is dependent upon the propriety of characterizing the library building at Howard University a "public building" or "public work." If the literal approach of the court in the Maiatico case were followed, such a characterization could not be made and the Davis Bacon Act would not be considered applicable to the proposed contract. The Maiatico case, however, involved a different statute and cannot, therefore, be said to be directly in point. In view of the broad social purpose of the Davis Bacon Act the courts might well hold that a liberal construction of this statute should be made which would uphold its applicability to the library building at Howard University.

However, since this question is not free from doubt and since it is a matter which may ultimately be presented to the Comptroller General for determination, I suggest that, prior to the negotiation of the proposed contract, the Comptroller General be requested to consider the question and render advice as to the proper procedure to be followed.

Nathan R. Margold, *Solicitor.*

[fol. 29] Department of the Interior
Washington, D. C.

Proposal and Specifications
for the Construction and Equipment
of the Library Building at Howard University
Washington, D. C.

Drawings and Specifications prepared by
Albert I Cassell, Architect, Howard University
Francis R. Weller, Inc., Consulting Engineers
Washington, D. C.

Bids will be opened in Rooms 6103-5, Department of the Interior, Washington, D. C., at 2 o'clock P. M.
Tuesday, September 1, 1936

(Seal: Department of the Interior)

Approved:
Oscar L. Chapman,
Assistant Secretary.

Department of the Interior,
Washington, October 15, 1934.

Federal Emergency Administration
of Public Works
Harold L. Ickes, Administrator
Washington

Bulletin No. 51

Information Relating to the Negotiation and Administration of Contracts for Federal Projects Under Title II of the National Industrial Recovery Act

Part I. Instructions to Contracting Officers

Part II. Instructions to Bidders and Contractors

Revised October 1, 1935

These Instructions Supersede Any Instructions Previously Issued Under Authority of the Administrator Which May Conflict Herewith

[fol. 30] United States Government Printing Office

Washington : 1935

Bulletin No. 51

Part I. Instructions to Contracting Officers

Section 1. All Government contracting officers and all other officers and employees engaged in the negotiation and administration of contracts for Federal projects should thoroughly familiarize themselves with the contents of this bulletin and the provisions of Government Form No. P. W. A. 51.

Sec. 2. (a) The forms required for general use in connection with construction and repair projects are as follows:

U. S. Government Combined Form No. P. W. A. 50.
U. S. Government Form of Contract No. P. W. A. 51.
U. S. Government Standard Form of Bid Bond No. 24.
U. S. Government Standard Form of Performance Bond No. 25.
U. S. Government Standard Form of Payment Bond No. 25 A for the protection of labor and materialman, pursuant to Public Act No. 321, Seventy-fourth Congress, approved August 24, 1935.

(b) The forms required for general use in connection with the purchase of supplies and materials are as follows:

U. S. Government Standard Form No. 30.
U. S. Government Standard Form No. 31.
U. S. Government Standard Form No. 32.
U. S. Government Standard Form No. 33.
U. S. Government Standard Form of Bid Bond No. 24.
U. S. Government Standard Form of Performance Bond No. 25.

Sec. 3. Invitations for bids may be signed and issued by any duly authorized officer or employee, but acceptance may be made only by the contracting officer or his duly authorized representative.

Sec. 4 (a) Contracts in any sum covering only the delivery of stock materials or supplies, or contracts for materials or supplies to be fabricated in accordance with Government or contractor's specifications may be entered into on Government Standard Forms No. 32 or No. 33.

[fol. 31] (b) When any P. W. A. construction or repair project does not exceed $2,000 it may be completed by acceptance on Form No. P. W. A. 50 by the authorized Government officer involved, without requiring execution of Form No. P. W. A. 51 and without requiring the furnishing of a performance bond or a payment bond; but in any event Form No. P. W. A. 51 shall apply and that form shall be attached to Form No. P. W. A. 50 and incorporated by reference.

Sec. 5. Neither bid nor performance bonds shall generally be required when the execution of Form No. P. W. A. 51 is not required or is waived, but the contracting officer must, when required by statute, or in the absence of a statute may, in his discretion, require either or both of such bonds.

Sec. 8. No deviation from U. S. Government Combined Form No. P. W. A. 50 and U. S. Government Form of Contract No. P. W. A. 51, referred to herein, will be permitted without prior approval of the Director of Procurement and of the Administrator. No deviation from U. S. Government Forms Nos. 30, 31, 32, 33, U. S. Government Standard Form of Bid Bond No. 24, U. S. Government Standard Form of Performance Bond No. 25 and U. S. Government Standard Form of Payment Bond No. 25A, referred to herein, will be permitted without prior approval of the Director of Procurement.

Division No. I

Section No. I

Specifications

General Conditions

Note.—This project is authorized under Title II of the National Industrial Recovery Act approved June 16, 1933. The contract therefore will be executed on U. S. Government Form P. W. A. 51, approved by the Federal Emergency Administrator of Public Works, October 1, 1935. The attention of bidders is called to this form of contract and to the bulletin No. 51 of the Federal Emergency Administration of Public Works, dated October 1, 1935, Part II of which contains instructions to bidders and contractors

[fol. 32] for Federal projects under Title II of the National Industrial Recovery Act.

Under appropriation No. 4-031 5640.7 "National Industrial Recovery," "Interior," Howard University, 1933-35. Subhead "Construction and Equipment of Library Building"

G-3. Notice.—All contractors, subcontractors, manufacturers, material dealers, etc., are hereby notified that the General Conditions are an integral part of the Specifications, and the Contract. The work shall be executed in accordance with the Drawings hereinbefore listed, the specifications and such additional drawings and instructions as may be furnished from time to time during the progress of the work by the Architect.

G-8. Performance bond.—The successful bidder must furnish a satisfactory bond, in the amount of 50 per cent of the contract price, executed upon the Standard Form No. 25 in use by the department, by sureties acceptable to the department, insuring the fulfillment of all provisions of the contract and covering all guaranties herein provided for, and prompt payment of all persons furnishing labor and materials required in the prosecution of the work. The form of bond may be seen upon application. A copy of the bond will be furnished the contractor after its acceptance.

G-10. Additional security.—Should any surety upon the bond for the performance of this contract become unacceptable to the Government the Contractor must promptly furnish such additional security as may be required from time to time to protect the interest of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by this contract.

G-12. Subcontractors.—The names of all subcontractors proposed to be used on the work are to be submitted when directed for approval by the department representative before any work is awarded to them; if requested in connection with special branches of the work, the general contractor shall submit the location of at least three jobs in which said firms have executed contracts of the same character as the work included in this contract, in order that examination of the workmanship and materials may be made.

[fol. 33] The contractor must produce, when called upon by the department, vouchers or affidavits from the subcontractors and material men to show that the work is being paid for, and also the outstanding claims against the work.

The contractor shall be responsible for all acts of the subcontractors employed by him, and the approval of the department or its representative of any subcontractor will not relieve the general contractor of such responsibility. The failure of any subcontractor to complete his branch of the work in a satisfactory manner within the proper time will not excuse the contractor for any delay in the completion of the entire contract.

No subcontractor or other person furnishing material or labor to the contractor will be recognized, nor will the department be responsible in any way for the claims of such person beyond the taking of a payment and a performance bond, as required by the Act of Congress approved August 24, 1935, which provides in substance that when a formal contract is let for the erection or repair of a public building, etc., the contractor, before commencing such work, shall furnish a payment bond and a performance bond. (See Public No. 321—74th Congress—H. R. 8519 attached to and a part of these specifications.)

G-32. Eight-hour law—Convict labor.—The attention of the bidders is called to the Act of Congress approved August 1, 1892 (27 Stat. 340), as amended by Act of March 3, 1931 (37 Stat. 726), and June 19, 1913 (37 Stat. 137), limiting the hours of daily service of laborers and mechanics employed upon public works of the United States to eight hours in any one calendar day (206 U. S. 246).

For the purpose of enabling the Department of Labor to answer inquiries concerning the work done under the abovementioned laws, the contractor will be required to furnish the Government with the following information relating to his subcontracts as soon as he definitely determines upon the same: The names and addresses of all subcontractors contracting directly with the contractor; the character and location of the work covered by the contract; the time limit, if any, and the amount of money involved in the contract.

The contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

[fol. 34] G-51: Rate of wages.—In compliance with Article 18(c) of U. S. Government Form of Contract as revised

October 1; 1935, prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on March 1, 1935, shall apply when such rates are above zonal minimum rates specified by the Public Works Administration, in this library project the following wage scale for building mechanics and laborers in the District of Columbia will obtain:

Wage Scale
Building Mechanics and Laborers
Washington, D. C., and Vicinity
March 1, 1935

	Rates per Hour (8 hrs. per day)
Asbestos Workers	$1.25
Boiler Makers	1.37½
Boiler Makers' Helpers	1.25
Bricklayers	1.50
Building Laborers	.55
Carpenters and Pile Drivermen	1.25
Carpet, Linoleum and Soft Tile Layers	1.00
Cement Finishers	1.25
Electrical Workers	1.65
Composition Roofers & Water Proofers	.95 and $1.00
Elevator Constructors	1.66
Elevator Constructors' Helpers	1.16
Glaziers	1.25
Granite Cutters	1.50
Hardwood Finishers—Inside, $1.25; Outside	1.37½
Iron Workers (Ornamental)	1.75—six hour day
Iron Workers (Structural)	1.75—six hour day
Marble Setters & Masons	1.50
Marble Masons' Helpers	.75
Masons' Tenders	.50
Mortar Mixers	.50
Plasterers	1.50—six hour day
Plasterers' Tenders	.87½

[fols. 35-36]

Plumbers	1.50
Plumbers' Laborers	.62½

Painters & Decorators	1.37½–seven hours per day
Paper Hangers	1.00
Reenforce Rodmen	1.25
Sheet Metal Workers	1.50
Slate and Tile Workers	1.25
Sprinkler Fitters	1.12½
Sprinkler Fitters' Helpers	.82½
Steam Fitters	1.50
Steam Fitters' Helpers	.82½
Soft Stone Cutters	1.25
Stone Masons	1.50
Tile & Terrazzo Workers	1.30
Tile & Terrazzo Workers' Helpers	.75
Truck Drivers (Dump Truck)—	
1½ tons and under	.45; over 1½ tons .65
Truck Drivers—Heavy Hauling—	
such as Struct. Steel	.75; trailer involved. .85
Truck Drivers' Helper	.60
Wood, Wire, and Metal Lathers	1.37½

Engineers, classified, $1.37½ to $1.65 per hour—as follows:

Derricks, $66.00 per week

Double Drum Hoists, $1.50 per hour

Single Drum Hoists, $1.43¾ per hour

Pumps, compressors, concrete mixers, etc., $1.37½

Apprentices, $1.00 per hour

Power Shovels on building foundations, $66.00 per week

Power Shovels on street, sewer and road works, $55.00 per week

Cranes, $66.00 per week

Pile Drivers, $66.00 per week

[fol. 37] PLAINTIFF'S EXHIBIT No. 4

Bonds of Contractors on Public Works

Hearing Before the Committee on the Judiciary, House of Representatives, Seventy-fourth Congress, First Session, on H. R. 2068, H. R. 4027, H. R. 4231, H. R. 4461, H. R. 5054, H. R. 6018, H. R. 6115, H. R. 6677, H. R. 8519

Serial 4

March 8, 22, April 26, and May 3, 1935

[fols. 38-39] Committee on the Judiciary

Hatton W. Sumners, Texas, *Chairman.*
Andrew J. Montague, Virginia.
Emanuel Celler, New York.
W. V. Gregory, Kentucky.
Zebulon Weaver, North Carolina.
John E. Miller, Arkansas.
Arthur D. Healey, Massachusetts.
Warren J. Duffey, Ohio.
Wesley Lloyd, Washington.
J. LeRoy Adair, Illinois.
Robert L. Ramsay, West Virginia.
Francis E. Walter, Pennsylvania.
P. L. Gassaway, Oklahoma.
Walter Chandler, Tennessee.
Hubert Utterback, Iowa.
James P. B. Duffy, New York.
Charles F. McLaughlin, Nebraska.
William M. Citron, Connecticut.
Randolph Perkins, New Jersey.
U. S. Guyer, Kansas.
Clarence E. Hancock, New York.
William E. Hess, Ohio.
Earl C. Michener, Michigan.
John M. Robsion, Kentucky.
William H. Wilson, Pennsylvania.
Elmore Whitehurst, *Clerk.*
Subcommittee No. 1 of the Committee on the Judiciary

Andrew J. Montague, Virginia, *Chairman.*
John E. Miller, Arkansas.

Warren J. Duffey, Ohio.
Charles F. McLaughlin, Nebraska.
Randolph Perkins, New Jersey.
John M. Robsion, Kentucky.

[fol. 40] BONDS OF CONTRACTORS ON PUBLIC WORKS

Friday, March 8, 1935

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE, No. 1,
Washington, D. C.

The subcommittee met at 10:30 a. m., Hon. John E. Miller (chairman) presiding.

MR. MILLER: The committee will come to order. The subcommittee has voted to direct its attention to H. R. 2068, introduced by Mr. Taylor; and H. R. 6018, by Mr. Mead; and H. R. 5054, by Mr. Dockweiler; and H. R. 4461, by Mr. Collins. All these bills deal with the same general subject; and it was the thought of the subcommittee that we would like to have the reaction and opinion of members in reference to those bills that deal with the general subject of requiring a bond for the benefit of laborers and materialmen who deal with subcontractors on public works.

(The bills under consideration follow:)

[H. R. 2068, 74th Cong., 1st sess.]

A BILL For the protection of subcontractors, labor, and materials employed in public works

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every contract with the United States for the construction or repair of public work, where the amount is in excess of $2,000, shall be accompanied—

(1) By a performance bond, with good and sufficient surety or sureties, upon which suit may be brought by the United States within twelve months from final settlement under the contract.

(2) By an additional bond, with good and sufficient surety or sureties, including, among other things, the obligation

that the contractor shall promptly make payment to all persons supplying labor or material for such work.

Every person, copartnership, association, or corporation who, whether as subcontractor or otherwise, has supplied labor or material for such work, whether or not the said labor or material enter into and become component parts of the work or improvement contemplated, and who has not been paid therefor, shall have the right to sue on said additional bond in the name of the United States for his, their, or its use and benefit, in the appropriate court of the United States for the district in which the contract was to be performed, irrespective of the amount in controversy, and not elsewh , and to prosecute the same to final judgment for suc n or sums as may be justly due him, them, or it, and to have execution thereon: *Provided, however*, That the United States shall not be liable for the payment of any costs or expenses of any such suit.

No such suit shall be commenced prior to ninety days from the date upon which the said person, copartnership, association, or corporation furnished, supplied, or performed the last of the labor or material for which the said claim is made, and every such suit shall be commenced not later than twelve months from the date of final settlement under the contract.

Any such person, copartnership, association, or corporation who has no contractual relationship, express or implied, with the contractor furnishing the said additional [fol. 41] bond, shall not have a right of action upon the said additional bond unless the said person, copartnership, association, or corporation shall have given written notice to the contractor or his surety within ninety days after such labor and/or material has been supplied, stating with substantial accuracy the amount claimed and the name of the party with whom the said person, copartnership, association, or corporation contracted. Said notice shall be served either in the manner now or hereafter provided by law for the service of a summons, save that service need not be made by the marshal, or by mailing said notice by registered mail, postage prepaid, in an envelop addressed to the contractor at his last known place of business or to the surety at its principal office or place of business.

Any claimant under such bond shall, upon application therefor and furnishing an affidavit to the General Accounting Office that he has supplied labor or materials for such

work and payment therefor has not been made, be furnished, at the cost of the applicant, with a certified copy of the said contract and additional bond, upon which he may bring suit, and he and his sureties on said bond shall also be furnished by the General Accounting Office with a statement of the date when final settlement has been made under the contract, which statement of the date of final settlement shall be conclusive upon the parties. A copy of said additional bond and contract, certified as aforesaid, shall be prima facie evidence of the contents and due execution and delivery of the original.

If the full amount of the liability of the sureties on said additional bond is insufficient to pay all amounts awarded in such suits, the same shall be prorated among the judgment creditors. I any such suit, the sureties on the additional bond may pay into court for distribution among all claimants the full amount of their liability under the additional bond, and, upon so doing, they will be relieved from further liability.

(b) Performance bonds or other security may be required in cases other than those specified in paragraph (a) of this section.

(c) Whenever any bond, guaranty, or undertaking, with surety or sureties, is required by this Act, United States bonds or notes may be furnished as provided by section 1126 of the Revenue Act of 1926 (44 Stat. L. 122).

(d) Performance bonds may be waived for work to be done in a foreign country when the head of the department finds that the procurement of a bond is impracticable.

This Act shall take effect upon approval, but any contract entered into or any rights or remedies that have accrued prior to that date shall be settled, adjusted, determined, and enforced without regard to this Act.

[H. R. 4027, 74th Cong., 1st sess.]

A BILL To provide that moneys paid to contractors shall constitute trust funds; misapplication thereof to constitute a larceny; and to amend and supplement the Act entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works", approved August 13th, 1894, as amended by Act approved February 24, 1905

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That the Act entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works", approved August 13, 1894 (28 Stat. L. 278), as amended by the Act approved February 24, 1905 (33 Stat. L. 811), is hereby further amended and supplemented by adding at the end thereof the following section:

MONEYS PAID TO CONTRACTOR OF SUBCONTRACTOR TO CONSTITUTE A TRUST FUND; MISAPPLICATION A LARCENY.—The funds received by a contractor from the United States, or by a subcontractor from a contractor, for the construction of any public building or the prosecution and completion or for the repair of any public building or public work under a contract with the United States, shall constitute trust funds in the hands of such contractor or subcontractor to be applied first to the payment of claims of subcontractors, architects, engineers, surveyors, laborers, and material men arising out of the improvement, and for the payment of premiums on surety bonds or bond filed and premiums on insurance accruing during the making of the improvement, and said trust shall be deemed discharged when all such claims are paid. Any contractor or subcontractor or any officer, director, or agent of any contractor [fol. 42] or subcontractor who applies or consents to the application of such funds for any purpose other than the foregoing and fails to pay the claims hereinbefore mentioned is guilty of larceny and is punishable as provided by law therefor.

[H. R. 4231, 74th Cong., 1st sess.]

A BILL Extending the obligation of bonds of contractors for public buildings to include premiums for insurance

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Act entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works", approved August 13, 1894, as amended, is amended by adding the following sentence: "The obligation of any bond executed pursuant to the provisions of this Act shall extend to the payment of premiums for insurance against liability for bodily injuries to employees and other persons, and for property damage, arising out of the construction or repair of any public building or public work, and any person who furnishes such insurance shall be entitled to

the benefits of this Act to the same extent and in the same manner as persons who furnish labor or materials."

[H. R. 4461, 74th Cong., 1st sess.]

A BILL To secure the payment of the claims of persons employed by contractors upon public works, and the claims of persons who furnish materials, supplies, teams, implements, or machinery used or consumed by such contractors in the performance of such works, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every contractor, person, company, or corporation to whom is awarded a contract involving an expenditure in excess of $100 for the improvement, erection, or construction of any building, road, bridge, or other structure, excavation, or other mechanical work for the United States or any board, commission, department, or political subdivision or agency of the United States, shall in addition to any bond required under the Act of August 13, 1894, as amended (U. S. C., title 40, sec. 270), before entering upon the performance of such work, file with the officer by whom such contract was awarded, a good and sufficient bond, to be approved by such officer, in the sum not less than one-half of the total amount payable by the terms of the contract: *Provided*, That whenever the total amount, payable by the terms of such contract shall be not less than $5,000,000 or more than $10,000,000, a bond in a sum not less than one-fourth of the amount payable under the terms of the contract may be accepted, and if the amount payable under any such contract exceeds the sum of $10,000,000, a bond in the sum of $2,500,000 shall be sufficient; such bond shall be executed by either two or more good and sufficient sureties or by corporate surety as provided by law, in an amount not less than the sum specified in the bond, and must provide that if the contractor, person, company, or corporation, or his or its subcontractors fail to pay for any materials, provisions, provender, or other supplies, or teams used in, upon, for, or about the performance of the work contracted to be done, or for any work or labor thereon of any kind, that the surety or sureties will pay for the same, in an amount not exceeding the sum specified in the bond, and, also, in case suit is brought upon such bond, a reason-

able attorney's fee to be fixed by the court, and any penalties assessed under the law of the State in which such contract is to be performed. Such bond must by its terms inure to the benefit of any and all persons, companies, and corporations entitled to file claims under this Act so as to give a right of action to them or their assigns in any suit brought upon said bond. Said bond shall also provide that actions on it may be commenced in any court of competent jurisdiction in the State wherein the contract is to be performed. Unless such bond is filed as herein provided no claim in favor of the contractor arising under such contract shall be audited, allowed, or paid by any disbursing officer of the United States, but persons who have in good faith performed work upon such contract, or supplied materials for the execution thereof, shall, upon giving the notice prescribed in section 2 hereof, be entitled to receive as compensation the reasonable value of the labor performed or materials furnished, on proving to the satisfaction of [fol. 43] the public disbursing officer of the United States or of the board, commission, or department thereof whose duty it would have been to pay said contractor should said bond have been filed, that said material has been furnished or labor performed.

SEC. 2. (a) Any materialism, person, company, or corporation furnishing materials, provisions, provender, or other supplies used in, upon, for or about the performance of the work contracted to be executed or performed, or any person, company, or corporation renting or hiring teams or implements or machinery for or contributing to said work to be done, or any person who performed work or labor upon the same, or any person who supplies both work and materials and whose claim has not been paid by the contractor, company, or corporation, to whom the contract has been awarded, or by the subcontractors of said contractor, company, or corporation, may at any time within thirty days after the completion of said contract file with the public disbursing officer whose duty it is to make payments under the provisions of such contract, a verified statement of such claims, together with a statement that the same have not been paid. A copy of said notice shall be served personally on the contractor or the superintendent of the contractor in charge of operations under the contract to be executed, and his surety, or may be served by mailing a copy of said notice to the contractor, or the superintendent

of the contractor in charge of operations under the contract to be executed, and his surety.

(b) Within twenty days after receipt of said notice the contractor, his superintendent, or agent, or the surety, may file a notice of dispute with the public disbursing officer with whom the stop notice has been filed, setting forth the grounds on which the claim is disputed, which notice shall be verified and a copy thereof sent to the claimant, his heirs, or assigns, at the address given at the stop notice. If no notice of dispute is filed with the public disbursing officer within twenty days he shall pay to the claimant the amount of said claim, together with any accrued penalties, provided by the laws of the United States or State in which the contract is performed, of which he shall have notice, and payment thereof shall be credited as a payment on the balance due the contractor and constitute a complete acquittance for the amount so paid. It shall be mandatory that the public disbursing officer within ten days after the completion of any contract or structure or work of improvement provided for in this Act, or within ten days after there has been a cessation from labor thereon for a period of thirty days, file for record in the office of the county recorder of the county or counties where the property is situated, a notice setting forth the date when the same was completed or on which cessation from labor occurred, together with the name, title, and address of the public disbursing officer whose duty it is to pay the contractor, a description of the property or public work or structure sufficient for identification, the name of the contractor or contractors, and the names of the sureties, if any; which notice shall be verified by said public disbursing officer, and in case such notice be not so filed, it will be presumed that the date of completion was the date of actual use or occupancy of such improvement or structure in the manner for which said structure or improvement was intended, and any stop notice filed under the provisions of this section must be filed within the thirty days next succeeding the filing of said notice of completion, or if said notice be not so filed, within sixty days after the actual use or occupancy of the improvement structure in the manner for which it was intended. Actions brought under this section shall be prosecuted with due diligence, and in case of failure to prosecute, defendants may apply to the court for a dismissal on these grounds,

and if dismissal be granted, money so withheld shall be paid to the parties to whom they are due.

(c) When a notice of dispute has been filed and a copy thereof served on claimant as provided, an action must be commenced by the claimant, his heirs, or assigns, within thirty days thereafter or action on such stop notice shall be forever barred. Actions may be brought in any court of the State that would have jurisdiction of the parties if an officer of the United States were not a party thereto and shall include as defendants the public disbursing officer whose duty it is to make payments to the contractor, the contractor and his surety, if known.

(d) Judgments when recovered under the provisions of this Act shall be entered against the contractor and/or his surety, and shall direct the defendant public disbursing officer to pay the judgment-creditor the amount of said judgment with costs and accruing costs, and such payments [fol. 44] shall be charged against the balance due the contractor and will be a complete acquittance for the amount so paid.

(e) Any number of persons who have given such stop notices may join in the action and when separate actions are commenced the court first declaring jurisdiction may consolidate them. Upon the demand of the public disbursing officer the court shall require all claimants to be included in such action to the end that the respective rights of all parties may be adjudicated and settled therein. There shall be no priority between such claimants except as provided by the law of the State in which said contract is to be executed.

(f) No assignment by the contractor of the whole or any part of the money due him or to be due him under the contract, or for "extras" in connection therewith, whether made before a verified claim is filed as provided for herein or after said claim is filed, shall be held to take priority over claims filed under this section and such assignment shall have no binding force insofar as the rights of the claimants who filed claims hereunder, or their assigns, are concerned: *Provided*, That nothing in this section shall be construed to prohibit the payment of any money to the contractor or his assigns so long as no verified claims are on file prior to the time the disbursing officer shall have actually surrendered possession of the warrant, checks,

bonds, or money, nor prohibit the payment to said contractor or his assigns of any money due him or his assigns over and above the total amount of the claims filed at that time plus such interest penalties and court costs as might be reasonably anticipated in connection with said claims.

(g) Suit against the surety or sureties on the bond of the contractor required under section 1 hereof may be brought by any claimant or his assign at any time after the claimant has ceased to perform labor or furnish material or both and until the expiration of six months after the period in which verified claims may be filed as provided herein. The filing of a verified claim shall not be a condition precedent to the maintenance of such action against the surety or sureties on the bond and an action on such bond may be maintained separately from and without the filing of an action against the public disbursing officer whose duty is to pay the contractor. Upon the trial of any action, under the provisions of this Act, the court shall award to the prevailing party a reasonable attorney's fee, to be taxed as costs, and to be included in the judgment therein rendered.

Sec. 3. This Act shall take effect upon the expiration of sixty days after the date of its enactment, but it shall not apply with respect to any contract (or any bond relating thereto) awarded pursuant to any invitation for bids issued on or before the date it takes effect.

Sec. 4. Such provisions of the Act entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works", approved August 13, 1894, as amended (U. S. C., title 40, sec. 270), as relate to the additional obligation for the payment to persons supplying labor or materials and to the enforcement of such obligation, are hereby repealed, except that such provisions shall remain in force with respect to contracts (or any bond relating thereto) for which invitations for bids have been issued on or before the date this Act takes effect.

[H. R. 5054, 74th Cong., 1st sess.]

A BILL To amend an Act approved August 13, 1894, entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works"

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That the Act entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works", approved August 13, 1894, is hereby amended so as to read as follows:

"That hereafter any person or persons entering into a formal contract with the United States for the construction of any public work, or for repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond to the United States, with good and sufficient sureties, and that in addition thereto he shall be required to furnish good and sufficient bond in such sum as the United States shall designate, not to exceed, however, the estimated cost of such work or improvement, nor less than 50 per centum of the estimated cost, which said bond shall be made to inure to the benefit of any and all mechanics, materialmen, subcontractors, ar- [fol. 45] tisans, machinists, builders, teamsters, draymen, and all persons and laborers of every class performing labor upon or bestowing skill or other necessary services or furnishing materials, provisions, provender, or other supplies to be used or consumed in or furnishing appliances, teams, or power contributing to the performance of such public work or improvement, and shall provide that if the contractor, company, or corporation to whom said contract was awarded fails to pay for any materials furnished for said work or improvement, or for any work or labor done thereon, or for such skill, services, appliances, teams, power, provisions, provender, or other supplies, that the sureties will pay the same to an amount not exceeding the penal sum of said bond; and any person, company, or corporation who has furnished labor or materials, or such skill, services, appliances, teams, power, provisions, provender, or other supplies used in the construction or repair of any public buildings or public work and payment for which has not been made shall have the right to prosecute in his own name an action on said bond, which said action shall be instituted in the District Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy, and not elsewhere: *Provided*, That the person or persons supplying the contractor with labor or materials, or such skill, services, appliances, teams, power, provisions, provender, or other supplies, shall, prior to the commencement of said

action, furnish an affidavit to the department under the direction of which said work has been prosecuted that labor or materials, or such skill, services, appliances, teams, power, provisions, provender, or other supplies, for the prosecution of said work, has been supplied by him or them and payment for which has not been made, and shall thereupon be furnished with a certified copy of said contract and bond upon which he or they have a direct right to action: *Provided further*, That where suit is instituted by any of such creditors on such bond, it shall not be commenced until ninety days after the complete performance of the contract under which said creditor furnished such labor and material and under which he claims payment has not been made, and in no event shall such action be commenced more than one year after the completion of the said work and/or improvement as a whole: *And provided, however*, That in the event performance by the original contractor of such contract for the construction of public work be abandoned by such original contractor or such original contractor shall cease work thereon for any cause or be removed therefrom by the United States, or any agency thereof, and work under such contract shall thereupon cease for a period of six months, then such cessation from labor upon said original contract shall, at the end of said six months' period, be the equivalent of complete performance of said contract for the purpose only of the preceding provision, and action upon said labor and material bond may be instituted by any such creditor in such event at any time after ninety days after the constructive completion of such contract resulting from such cessation from labor thereon for said six months' period, and in the event of such constructive completion arising in the manner aforesaid, then in no event shall such action be commenced upon said labor and material bond more than one year after the constructive completion of such contract as aforesaid: *And provided further*, That if suit is so instituted by a creditor or creditors only one action shall be brought, and any creditor may intervene in such action and be made a party thereto within the time herein allowed for the commencing of such action.

"If the recovery on the bond shall be inadequate to pay the amounts found due to all creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among the claimants and creditors, the full

amount of the penal obligation on said bond, and in so doing the surety shall be relieved from further liability: *Provided*, That in all suits instituted under the provisions of this Act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor."

[fol. 46] [H. R. 6018, 74th Cong., 1st sess.]

A BILL To require public contractors to furnish performance bonds for the protection of the United States and payment bonds for the protection of persons furnishing labor and materials, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States, is awarded to any person, such person shall furnish the following bonds, which shall become binding upon award of the contract to such person (hereinafter referred to as "contractor"):

(1) A performance bond, with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he deems adequate for the protection of the United States, guaranteeing to the United States complete performance of such contract. No action shall be commenced on such bond after the expiration of one year after the date of final settlement of such contract.

(2) A payment bond, with a surety or sureties satisfactory to such officer, and in such amount as he deems adequate for the protection of all persons who supply labor or materials for such performance, guaranteeing to the United States for the use of each such person payment in full for such labor or material.

(b) The contracting officer in respect of any contract is authorized to waive requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require performance bonds or other security in cases other than those specified in subsection (a) of this section.

SEC. 2. (a) Any person who supplies labor or material for the performance of any contract in respect of which a payment bond is furnished under this Act and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of such labor or material was supplied by him shall, if he has made written demand upon the contractor for such payment before the expiration of such period, specifying the amount owed, and if the contractor has failed to comply therewith before the expiration of such period, be entitled to sue on such bond for such amount, or the balance thereof unpaid at the time of institution of such suit. In case the labor or material was not supplied by such person in performance of a contract, express or implied, between such person and the contractor, such written demand shall include the name and address of the individual, association, partnership, or corporation with which such person contracted to furnish such labor or material. Such demand upon the contractor shall be served by such person in any manner in which the United States marshal of the district in which the contractor resides or does business is authorized by law to serve a summons, or by mailing such demand by registered mail, postage prepaid, in an envelop addressed to the contractor at his last known place of business or residence or to any surety on such payment bond at the last known place of business or residence of such surety.

(b) In case any person institutes suit under this section on any payment bond, any other person or persons entitled to sue on such bond may intervene therein, and if the full amount of liability of the sureties on such bond, or the amount of liability remaining on such bond, is insufficient to pay the sums awarded to such persons by the court, the court shall prorate such amount among such persons.

(c) Suits instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States district court for any district in which the contract is performed, and not elsewhere, irrespective of the amount in controversy, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit.

Sec. 3. The Comptroller General is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has taken the action required by this Act to enable him to sue on any payment bond or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which [fol. 47] copy shall be prima facie evidence of the contents, execution, and delivery of the original, and, in case final settlement of such contract has been made, a certified statement of the date of such settlement, which shall be conclusive as to such date. Applicants shall pay for such certified copies and certified statements such fees as the Comptroller General fixes to cover the cost of preparation thereof.

Sec. 4. The first proviso of section 1126 of the Revenue Act of 1926, as amended, is amended by inserting after the phrase "therein provided", the following: "or in case any person files suit on a payment bond as provided in the Public Contractor Bonding Act and notifies the Comptroller General of such action,".

Sec. 5. As used in this Act the term "person" means any individual, association, partnership, or corporation.

Sec. 6. This Act may be cited as the "Public Contractor Bonding Act."

Sec. 7. This Act shall take effect upon the expiration of after the date of its enactment, but shall not apply to any contract awarded pursuant to any invitation for bids issued on or before the date it takes effect, or to any persons or bonds in respect of any such contract. The Act entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works", approved August 13, 1894, as amended (U. S. C., title 40, sec. 270), is

repealed, except that such Act shall remain in force with respect to contracts for which invitations for bids have been issued on or before the date this Act takes effect, and to persons or bonds in respect of such contracts.

[H. R. 6115, 74th Cong., 1st sess.]

A BILL To amend an Act approved August 13, 1894, entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works", approved August 13, 1894, is hereby amended so as to read as follows:

"That hereafter any person or persons entering into a formal contract with the United States for the construction of any public work, or for repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond to the United States, with good and sufficient sureties, and that in addition thereto he shall be required to furnish good and sufficient bond in such sum as the United States shall designate, not to exceed, however, the estimated cost of such work or improvement, nor less than 50 per centum of the estimated cost, which said bond shall be made to inure to the benefit of any and all mechanics, materialmen, subcontractors, artisans, machinists, builders, teamsters, draymen, and all persons and laborers of every class performing labor upon or bestowing skill or other necessary services or furnishing materials, provisions, provender, or other supplies to be used or consumed in or furnishing appliances, teams, or power contributing to the performance of such public work or improvement, and shall provide that if the contractor, company, or corporation to whom said contract was awarded fails to pay for any materials furnished for said work or improvement, or for any work or labor done thereon, or for such skill, services, appliances, teams, power, provisions, provender, or other supplies, that the sureties will pay the same to an amount not exceeding the penal sum of said bond; and any person, company, or corpora-

tion who has furnished labor or materials, or such skill, services, appliances, teams, power, provisions, provender, or other supplies used in the construction or repair of any public buildings or public work and payment for which has not been made shall have the right to prosecute in his own name, an action on said bond, which said action shall be instituted in the District Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy, and not elsewhere: *Provided*, That the person or persons supplying the contractor with labor or materials, or such skill, services, appliances, teams, power, provisions, provender, or other supplies, shall, prior to the commencement of said action, furnish an affidavit to the department under the direction of which said work has been prosecuted that labor or materials, or such skill, services, appliances, teams, power, provisions, provender, or other supplies, for the prosecution of said work, has been supplied by him or them and payment for which has not been made, and shall thereupon be furnished with a certified copy of said contract and bond upon which he or they have a direct right to action: [fol. 48] *Provided further*, That where suit is instituted by any of such creditors on such bond, it shall not be commenced until ninety days after the complete performance of the contract under which said creditor furnished such labor and material and under which he claims payment has not been made, and in no event shall such action be commenced more than one year after the completion of the said work and/or improvement as a whole: *And provided, however*, That in the event performance by the original contractor of such contract for the construction of public work be abandoned by such original contractor or such original contractor shall cease work thereon for any cause or be removed therefrom by the United States, or any agency thereof, and work under such contract shall thereupon cease for a period of six months, then such cessation from labor upon said original contract shall, at the end of said six months' period, be the equivalent of complete performance of said contract for the purpose only of the preceding provision, and action upon said labor and material bond may be instituted by any such creditor in such event at any time after ninety days after the constructive completion of such contract resulting from such cessation from labor thereon for said six months' period, and in the event

of such constructive completion arising in the manner aforesaid, then in no event shall such action be commenced upon said labor and material bond more than one year after the constructive completion of such contract as aforesaid: *And provided further*, That if suit is so instituted by a creditor or creditors only one action shall be bought and any creditor may intervene in such action and be made a party thereto within the time herein allowed for the commencing of such action.

"If the recovery on the bond shall be inadequate to pay the amounts ~~found~~ *found* due to all creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among the claimants and creditors, the full amount of the penal obligation on said bond, and in so doing the surety shall be relieved from further liability: *Provided*, That in all suits instituted under the provisions of this Act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor."

[H. R. 6677, 74th Cong., 1st sess.]

A BILL requiring contracts for the construction, alteration, and repair of any public building or public work of the United States to be accompanied by a performance bond protecting the United States and by an additional bond for the protection of persons furnishing material and labor for the construction, alteration, or repair of said public buildings or public work

Be it enacted by the Senate and House of Representatives of the United States States *of America in Congress assembled*, That (a) before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become bind-

ing upon the award of the contract to such person, who is hereinafter designated as "contractor":

1. A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

2. A payment bond with a surety or sureties satisfactory to such officer, for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Said payment bond shall be in a sum not less than one-half of the total amount payable by the terms of the contract: *Provided,* That whenever the total amount so payable shall be not less than $5,000,000 nor more than $10,000,000, a bond in a sum not less than one-fourth of the amount payable under the terms of the contract may be accepted and if the amount payable under any such contract exceeds the sum of $10,000,000 a bond in the sum of $2,500,000 may be accepted.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

[fol. 49] (c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

Sec. 2. (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract in respect of which a payment bond is furnished under this Act and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor or material for which such claim is made was done, performed, furnished, or supplied by him, shall have the right to sue on such payment bond for such amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for such sum or sums as may be justly due him: *Provided, however,* That

any such person who has no contractual relationship, express or implied, with the contractor furnishing said payment bond shall not have a right of action upon the said payment bond unless such person shall have given written notice to said contractor within ninety days after such labor or material has been supplied by such person, stating with substantial accuracy the amount claimed and the name of the party with whom said person contracted. Such notice shall be served in any manner in which the United States marshal of the district in which the contractor does business or resides is authorized by law to serve a summons, save that such service need not be made by the marshal, or by mailing said notice by registered mail, postage prepaid, in an envelop addressed to the contractor at his last-known place of business or residence.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit.

Sec. 3. The Comptroller General is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be prima facie evidence of the contents, execution, and delivery of the original, and, in case final settlement of such contract has been made, a certified statement of the date of such settlement, which shall be conclusive as to such date upon the parties. Applicants shall pay for such certified copies and certified statements such fees as the Comptroller General fixes to cover the cost of preparation thereof.

Sec. 4. The term "person" and the masculine pronoun as used throughout this Act shall include all persons whether individuals, associations, copartnerships, or corporations,

Sec. 5. This Act shall take effect upon the expiration of sixty days after the date of its enactment, but shall not apply to any contract awarded pursuant to any invitation for bids issued on or before the date it takes effect, or to any persons or bonds in respect of any such contract. The Act entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works", approved August 13, 1894, as amended (U. S. C., title 40, sec. 270), is repealed, except that such Act shall remain in force with respect to contracts for which invitations for bids have been issued on or before the date this Act takes effect, and to persons or bonds in respect of such contracts. This Act shall thereupon replace the aforesaid Act of August 13, 1894 (U. S. C., title 40, sec. 270).

[H. R. 8519, 74th Cong., 1st sess.]

A BILL Requiring contracts for the construction, alteration, and repair of any public building or public work of the United States to be accompanied by a performance bond protecting the United States and by an additional bond for the protection of persons furnishing material and labor for the construction, alteration, or repair of said public buildings or public work.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public [fol. 50] building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract

shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

Sec. 2. (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under this Act and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to

whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit.

Sec. 3. The Comptroller General is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be prima facie evidence of the contents, execution, and delivery of the original, and, in case final settlement of such contract has been made, a certified statement of the date of such settlement, which shall be conclusive as to such date upon the parties. Applicants shall pay for such certified copies and certified statements such fees as the Comptroller General fixes to cover the cost of preparation thereof.

[fol. 51] Sec. 4. The term "person" and the masculine pronoun as used throughout this Act shall include all persons whether individuals, associations, copartnerships, or corporations.

Sec. 5. This Act shall take effect upon the expiration of sixty days after the date of its enactment, but shall not apply to any contract awarded pursuant to any invitation for bids issued on or before the date it takes effect, or to any persons or bonds in respect of any such contract. The Act entitled "An Act for the protection of persons fur-

nishing materials and labor for the construction of public works", approved August 13, 1894, as amended (U. S. C., title 40, sec. 270), is repealed, except that such Act shall remain in force with respect to contracts for which invitations for bids have been issued on or before the date this Act takes effect, and to persons or bonds in respect of such contracts.

* * * * * * *

Statement of Hon. John F. Dockweiler, a Representative in Congress From the State of California

Mr. Dockweiler: That is correct, Mr. Chairman—it is H. R. 5054.

That bill amends, of course, a very old act, which was approved August 13, 1894, for the protection of persons furnishing material and labor for construction on public works.

The subcommittee can well understand why a demand for that kind of a bill—a bill similar to that introduced by me—becomes prominent now, because of the tremendous amount of public works that is being undertaken throughout the country; and our public works are not confined any more to just building a post office and doing a little river and harbor work, but they seem to be ramified into all kinds and characters and classes of business and construction.

[fol. 52] Let me make this statement: I could just give it to the reporter, but I am not going to read my prepared statement exactly as written, but I am going to delete and change parts of it.

There is a real demand throughout the country for an amendment to this measure. Practically every State in the Union, in connection with its public works, has a requirement of two separate bonds on public works. There is a requirement for a bond for faithful performance and completion of the contract; and there is a separate bond running to the laborers, materialmen, and subcontractors who may furnish service or material to be used in a public structure.

My bill provides for this second type of bond. The law as it stands provides for the bond for the faithful performance on the part of a contractor for the contract, and the materialmen come in secondarily if there is anything left out of that bond.

I will continue to read from my memorandum:

Under the California statute—

and I will not recite it—

and under the laws of most of the other States, the fundamental requirement of a bond for laborers, subcontractors, and materialmen is that the bond shall be given to 50 per cent of the contract price.

This bill that I introduced (H. R. 5054) requires a bond of at least 50 per cent of the contract price, or not to exceed the full contract price.

Similar bond provisions you will also find in the various special assessment laws connected with special assessment districts organized under authority of the States. The surety companies writing those bonds charge premiums not upon the amount of the labor and material bond or the faithful performance bond, or both, but upon the contract price; and their premium rate is a certain percentage of the entire contract price, irrespective of whether there are separate bonds or one bond; they are a percentage of the amount of the contract price, either with respect to the faithful-performance bond or the labor and material bond, or both.

Legislative representatives of the surety companies in the State of California have advised me that this is the practice throughout the United States by the surety companies and therefore no difference in premium rate stated on Federal public works in the event the bond was split up—as the bill I introduced has provided—in requiring bonds to be given for materialmen and labor, in respect to the amendment to the Heard Act.

My bill amends what is commonly known as the "Heard Act."

My bill (H. R. 5054), in substance, was introduced last year by Congressman Evans, of my State; and I understand that a similar bill in the Senate was introduced by Senator Logan; but his bill goes a little further than mine and contains further provisions which might make it difficult of passage by both Houses of Congress; it brings up other questions.

The Heard Act as it stands today permits very substantial injustices to be done to laborers, materialmen, and subcontractors. There is only one bond written under that act, and

it enures, respectively, to the benefit of the Government, on the faithful performance of the contract, and to the benefit [fol. 53] of the laborers and materialmen and subcontractors. But the right of the laborers, materialmen, and subcontractors is postponed to an unreasonable length of time. Action under it by the Federal Government must be awaited, on the faithful-performance bond, which action can be brought at any time within 6 months after the full and final completion of the contract; and only after the end of that time can laborers, subcontractors, and materialmen have any relief under the bond.

In view of the fact that no additional premium cost would be reflected in the cost of public works arising out of severing the two bonds and permitting a direct right of action by laborers, subcontractors, and materialmen at a much earlier date, there would seem to be no good reason, from the standpoint of the Government, for not following the practice of the various State acts affecting public works.

From the standpoint of laborers, subcontractors, and materialmen, they are compelled to wait unduly long; and should a contractor default, they are really denied substantial justice on account of this unreasonable delay.

All that the materialmen, subcontractors, and laborers desire is a separate and direct right of action upon a separate bond.

As an example of that, I may say that in the small island lighthouse job, just off the coast of California near Los Angeles, the contract for this public work was originally let to the Roth Construction Co. by the Department of Commerce, Lighthouse Service, sometime after 1930; and the bond given by the Roth Construction Co. was signed by the United States Fidelity & Guaranty Co. as surety.

The Roth Construction Co. got into difficulties. In January 1930 a contract was relet, for the purpose of completion, to Carpenter Bros., at an increased cost, and a bond was written by Carpenter Bros., with the Massachusetts Bonding Co. as surety.

The work was not completed by Carpenter Bros., aided by the Massachusetts Bonding Co., until June of 1931. The final settlement was not made by the General Accounting Office of the Government until March 15, 1932, and the laborers, subcontractors, and materialmen employed by Carpenter Bros. were finally paid by the Massachusetts Bond-

ing Co., Carpenter Bros. having "gone broke" on the job—they were not finally paid until the fall of 1932.

Now, under the provisions of the Heard Act, no action could be maintained against the surety company on the Roth Construction Co. bond until Carpenter Bros. had completed their work—until final settlement was made by the Government and 6 months elapsed from that date.

All suits in the United States district courts against the surety of the Roth Construction Co. had to be postponed until the fall of 1932. Owing to the congestion in our Federal district court in Los Angeles, a speedy trial could not be obtained; and, as a result, the settlement of the claims on the Roth Construction Co. contract was postponed and was made in the latter part of the year 1934, although these men had done their work in 1930.

Included among the claims against the Roth Construction Co. were claims amounting to something over $3,000, of laborers, each of whom had a small amount due to him.

Such a situation should not be permitted to exist.

[fol. 54] The bureau of labor statistics and law enforcement of the State of California was very much exercised on the subject, and Mr. Arthur Johnson, the attorney for that bureau, has been trying, largely because of his experience in this and other jobs, to obtain a legislative amendment of the Heard Act along the lines which are suggested in my bill.

If a direct right of action had existed against the United States Fidelity & Guaranty Co., under a separate bond for the benefit of laborers and materialmen, it is reasonable to believe that the claims on this job would have been paid long before the claims arising under the Carpenter Co. and Massachusetts Co. jobs were settled.

Certainly, the laborers should not be compelled to wait 4 years to obtain payment, when more than 2 years of that time was due to their inability to maintain their right of action against the surety, owing to the peculiar provision of the Heard Act.

I can say that similar experiences in connection with Federal works have been found to exist all over the United States by laborers, subcontractors, and materialmen who have claims against Government contractors.

I might refer especially to a case arising in our jurisdiction, the particulars of which you can find in the printed report of the decisions of the United States District Court

for that district, in two cases entitled, respectively, "*United States of America* v. *Roth Construction Co.*, embraced in two separate suits, numbered, respectively, 5950-H and 5526-J.

It is a strange thing that, under one theory of the meaning of the Heard Act, the first suit that I have referred to has been held to be premature, and, under another interpretation, the second suit might have been too late. We know that one or the other was timely.

This uncertainty arises out of the uncertainty as to the meaning of the words used in the present Heard Act, which controls the time of commencement of litigation; those words are—

within 6 months from the complete and final settlement of such contract.

The contract referred to is the contract between the general contractor and the Government.

Now, Mr. Chairman and gentlemen, that is the extent of my statement. But I would like to leave with the subcommittee some additional letters that have come to me.

Mr. Robsion: What language in your bill fixes the date from which you compute the time of commencement of the action?

Mr. Dockweiler: Well, of course, my bill provides for two bonds, one for faithful performance of the contract, running in favor of the Government, and one for the materialmen and subcontractors and those who furnish labor. Those are two distinct bonds. Under the provisions in my bill for a bond which runs in favor of the materialmen, their cause of action starts within 6 months.

Mr. Robsion: It was said under the Heard Act that that was a simple act, but that was not very clear, and we clarified that.

Mr. Dockweiler: On page 3 of my bill (H. R. 5054) it says.

Where suit is instituted by any of such creditors on such bond, it shall not be commenced until ninety days after the complete performance of the contract under which said creditor furnished such labor and material and under which he claims payment has not been made.

[fol. 55] Mr. Robsion: Well, who is to determine when the contract is completed? Who fixes that?

Mr. Dockweiler: It reads similar to our State laws. It says:

In no event shall such action be commenced more than one year after the completion of said work or improvement.

Now, there are two kinds or characters of completion—actual completion and constructive completion. Constructive completion would be where there is an abandonment of the job for a period of 6 months, and then the time begins to run, or the statutory period begins to run. You see, on the next page of my bill it says:

That in the event performance by the original contractor of said contract for the construction of public works be abandoned by such original contractor, or such original contractor shall cease work thereon for any cause, or be removed therefrom by the United States, or any agency thereof, and work under such contract shall thereupon cease for a period of 6 months, then such cessation from labor upon said original contract shall, at the end of said 6 months' period, be the equivalent of complete performance of said contract.

Et cetera.

Mr. Robsion: If a contractor should cease work under the contract for 5 months and 29 days, he could go on and do his work?

Mr. Dockweiler: We would revise the contract, I should say.

Mr. Robsion: Well, he could do that again, and that could go on indefinitely.

Mr. Dockweiler: Under our State laws and practice, where a contractor abandons a job, it is constructively considered that he has abandoned it completely if he abandons the job for a period of 6 months. Under the wording of the Heard Act, there is then a final settlement by the Government.

Now, under the law as construed in the lighthouse case to which I referred, the claims of those men could not be paid until it was finally settled, and neither the laboring men nor the materialmen could file their bills until that was done; demurrers could have been lodged against their cause of action.

Mr. McLaughlin: Under the provisions of the Heard law the bond has two conditions:

One is that the bond is conditioned upon the faithful performance of the contract.

Mr. Dockweiler: That is correct.

Mr. McLaughlin: And the second is that it is conditioned upon the payment of materialmen and laborers?

Mr. Dockweiler: That is true.

Mr. McLaughlin: Now, the penal sum of the bond is one figure—one amount?

Mr. Dockweiler: That is right.

Mr. McLaughlin: What is your notion as to the reason why the law provides that materialmen and laborers shall be required to wait until 6 months after the final settlement and completion and acceptance before he can begin action? What is your notion as to why that condition is imposed in the bond? Would it not be true that the purpose of that second condition, namely, the postponement of action by the materialmen and laborers until 6 months after the completion is to insure the Government receiving full payment for the job or, in other words, insure the completion of the work? Is that not true?

[fol. 56] Mr. Dockweiler: Well, you refer to the language of the bond?

Mr. McLaughlin: No; I am referring to the recent language.

Mr. Dockweiler: I do not know what the language of the present bond is. I know what the language was that was written under the Heard Act, of course.

Mr. McLaughlin: Well, the statute should be read into that bond?

Mr. Dockweiler: The statute should be read into that and no more. They have no right to exceed the language of the statute. Now, the statute says 6 months. But my bill says within 90 days of completion—and if there is an actual completion, that the laboring man or material man may bring suit in not to exceed 1 year. It is a matter of time.

Mr. McLaughlin: I do not know that it is so much a matter of time; but just to get this before the committee, I will say that I am wondering if the purpose of this double condition in the one bond, and especially the purpose of the postponement of the action by the laborers and material men until 6 months after a given time, namely, after the date of completion and acceptance, is not to insure that the Government will be protected first by the bond?

Mr. Dockweiler: I see your point.

Mr. McLaughlin: Is that not correct?

Mr. Dockweiler: Well, that is possible.

Mr. McLaughlin: Let me go a little further——

Mr. Miller (interposing): That is, where they have only one bond?

Mr. Dockweiler: They have only one bond today.

Mr. McLaughlin: Now, if it requires the full amount of the bond to protect the Government, is there anything left for the material men, subcontractors, and labor?

Mr. Dockweiler: Not under the language of the Heard Act. The Government takes the amount of its debt, and whatever is left to these intervening creditors. They all intervene in the action. It is not only So-and-So, a laborer, or So-and-So, a material man; it is any of the creditors.

Mr. McLaughlin: Yes; I understand. Now, let me ask you this question: There is one penalty in the present bond. If that is $100,000, that $100,000 named in that bond inures first to the benefit of the Government of the United States?

Mr. Dockweiler: Yes; that is correct.

Mr. McLaughlin: And, secondly, it inures to the benefit of the material men and laborers and subcontractors?

Mr. Dockweiler: That is right.

Mr. McLaughlin: And a stated premium is charged for that protection?

Mr. Dockweiler: That is correct.

Mr. McLaughlin: Now, may I inquire about whether your bill would require the giving of two $100,000 bonds? In other words, if I understood you correctly, you would break this bond up into two bonds, a $100,000 bond conditioned for the faithful performance of the contract, which would run to the Government, and a second bond of $100,000, conditioned for the payment of material men, subcontractors and laborers?

Mr. Dockweiler: Yes.

[fol. 57] Mr. Miller: But do you not overlook the fact that the bond under the Heard Act as now existing is for the benefit of the laborers, subcontractors, and materialmen, but their trouble is a procedural trouble; right now that is their main trouble—this is a procedural question. I cannot see where the premium on the bond would be increased.

Mr. Dockweiler: That was my understanding.

Mr. Robsion: Well, the Government was undertaking to take care of the materialmen and the laborers, too, and that is all that you undertake to do by your bill?

Mr. Dockweiler: That is true.

Mr. Miller: Your bill provides that there shall be only one suit filed by the materialmen?

Mr. Dockweiler: That is correct.

Mr. Miller: And the others shall intervene in it?

Mr. Dockweiler: That is correct.

Mr. Miller: Well, do you not think—what is the reason why the laborers and the materialmen, if they so desire, should not be permitted to file separate suits? In other words, suppose a materialman files a suit today and the court upon the final hearing determines that that suit was prematurely filed and dismisses it.

[fol. 58] Mr. Dockweiler: Yes.

Mr. Miller: Now, under your requirement in the bill the others have intervened; in the meantime, the statute of limitations has run, and the suit in which their intervention was filed is dismissed—and out they go.

Mr. Dockweiler: That is correct. Let me explain that. Of course, you know that the Heard Act provides for only one suit on the part of the materialmen.

Mr. Miller: Yes.

Mr. Dockweiler: And you will observe that that bill provides for a notice to be published so many days.

Mr. Miller: The Heard Act provides that also.

Mr. Dockweiler: Here is the situation: There are, we will say, four laboring men, and each of them might have a claim for only $100. And it is expensive to file a suit in the first place, and then, in most of the United States District Courts, they have different divisions.

Mr. Miller: That is true.

Mr. Dockweiler: And we might have four divisions there, and the suit of each of those men might be referred to a separate division—John Doe, we will say, might have his suit referred to such-and-such division; another man would have his referred to another division, and so on.

Now, all of those suits should be consolidated, and should be heard upon the same evidence.

Mr. Miller: Yes. The senior judge would naturally see that that was done.

Mr. Dockweiler: Yes. I would have no objection to saying that they may intervene in the same suit or may bring separate suits.

Mr. Miller: I think they should have that right.

Mr. Robsion: Under this bill, if some other materialmen should intervene and the original action should go out, I do not believe that would put the intervener out of court.

Mr. Miller: Yes; it would.

Mr. Dockweiler: Of course, that is another thought.

Mr. McLaughlin: May I ask this fundamental question? Is the purpose of your bill merely to shorten the length of time within which a materialman or laborer may institute action to secure payment of his claim, or does it increase the liability of the surety or give increased protection to the Government and materialmen and laborers, taken together?

Mr. Dockweiler: I think it would increase protection to the laborers and the materialmen.

Mr. McLaughlin: In any other way than by shortening the time within which he can bring his action?

Mr. Dockweiler: And in the fact that the administrator of the Federal Department will then say, in effect, "I think, Mr. Contractor, that you have given a bond for $50,000 out of this $100,000, to take care of the materialmen and laborers, because this is a job that is going to be mostly labor and material." Do you see?

Mr. McLaughlin: Yes; I see your point.

Mr. Dockweiler: In other words, the administrator for the job for the Federal Government, if he uses his discretion merely in favor of the public-works job that is let—he can exercise his discretion in such a way as to take better care [fol. 59] of the materialmen and laborers; whereas the present bond is a mixture of both, for the protection of both the Government and the materialmen; and the United States might take all the money and the laborer would get nothing, as he would only get whatever residue there was left.

Mr. McLaughlin: Yes; I see.

Mr. Dockweiler: Now, the administrator may say, "This is practically all labor and material."

All right—we should have a bond for, say, $75,000 to protect these fellows so that we are sure that they are going to be paid for their labor and material. My bill is an added protection for the materialman and the laborer. It gives them better machinery and easier facilities——

Mr. Robsion (interposing): Not only that, but they are singled out and given special protection, just like the Government is given special protection?

Mr. Dockweiler: Yes.

Mr. Robsion: You are doing for the laborers and materialmen just as this other bill did for the Government?

Mr. Dockweiler: Yes, I am sure of that; and that they will benefit from every angle.

Mr. McLaughlin: Well, if the new bond is provided under this bill, and there are two bonds to take the place of the one bond under the Heard Act, affording the laborers and the Government combined more protection than was afforded under the Heard Act bond, then is it not true that necessarily sureties are held to a greater accountability, in that there is a greater liability imposed upon the sureties?

Mr. Dockweiler: Yes; I do not think you can escape that conclusion.

Mr. McLaughlin: Now, if that is true, how can it be true that there is no additional premium charge?

Mr. Miller: We will get to that question later.

Mr. Dockweiler: Well, when you resolve the question down in the manner you have, I think somewhere along the line there will be an additional premium, because the simple fact is that they are executing two separate instruments.

Mr. Miller: I think that is true.

Mr. Dockweiler: While that would not be an argument for giving the laborer protection—and I think the contractor will have to weave that into his proposed charges.

Mr. Robsion: Did not the Heard Act have it in mind to protect the Government, the materialmen, and the laborers?

Mr. Dockweiler: That is correct.

Mr. Robsion: Now, I do not understand why the Government, in making a contract, could not do that, because if they would take a sufficient bond, that purpose would be accomplished, would it not?

Mr. Dockweiler: Do you mean under the present law?

Mr. Robsion: Yes.

Mr. Dockweiler: Then the Congressman's suggestion is that you have not got the proper procedure for the materialmen and laborers to follow. They have got to wait not only for completion, but for the final settlement on the part of the United States, which, in the case that I suggested, represented 4 years.

[fol. 60] Mr. Robsion: Well, of course, if he would take an adequate bond, it would be different.

Mr. Dockweiler: Well, there might be an adequate bond and that difficulty would arise.

Mr. Robsion: He would take an adequate bond and modify the language and not require the laborer and materialmen to wait for the completion—would not the same purposes be served?

Mr. Dockweiler: I am really revising the language of the Heard Act. If the Congressmen here feel that they just want to revise the Heard Act to accomplish that purpose, I would be content. I just want results—I want results for the laboring man and the materialman.

Mr. Robsion: You want protection for the laborer and the materialman; and then a procedure that would permit them to get their money before this final settlement with the Government?

Mr. Dockweiler: That is it, exactly.

Mr. McLaughlin: How far does your bond give protection? Does it extend to subcontractors as well as contractors?

Mr. Dockweiler: I really had included in my language, in the language of my bill, I think, the subcontractor, so that it will include anybody who has furnished anything on the job.

Mr. Miller: Do you not think really, in view of the construction that the courts have placed upon material and labor used in projects—do you not think that you have a surplus of language there, Mr. Dockweiler?

Mr. Dockweiler: That may be true; yes.

Mr. Miller: It was more a precaution, of course, and you did not want to leave out anything.

Now, we have several other gentlemen here.

Have you completed your statement, Mr. Dockweiler?

Mr. Dockweiler: Yes; I have. I should like to leave a few letters with the committee.

Mr. Montague: You provide in your bill for two separate obligations?

Mr. Dockweiler: That is correct.

Mr. Montague: One for the Government and one for the materialmen?

Mr. Dockweiler: Yes.

Mr. Montague: With the requirement of two suits, one by the Government and one by the materialmen?

Mr. Dockweiler: That is right.

Mr. Montague: Now, the suits could be filed in the district courts?

Mr. Dockweiler: In the United States district court wherever the job is done.

Mr. Montague: It is possible, then, that you may find two suits, one for the protection of the laboring man and one for the protection of the Government, in different courts——

Mr. Dockweiler: No; they would be in the Federal courts.

Mr. Montague: I know they would be in the Federal courts, but in different courts.

Mr. Dockweiler: Do you mean in different divisions of the court?

Mr. Montague: Yes.

Mr. Dockweiler: But not in different districts. It is just like we have four subdivisions of our Federal district court [fol. 61] in Los Angeles, Calif.; and the Government case might be before Judge So-and-So, and the materialman's case might be before Judge So-and-So; but they would be in the same district, as I understand it, under my bill.

Mr. Montague: But before two different judges?

Mr. Dockweiler: Yes; in that case. But I think the cases could be consolidated by whoever has charge of the assignment of the calendar in the United States district court.

Now, we will hear from Mr. Cushman.

Mr. Taylor: Before you do that, Mr. Chairman, I would like to say in connection with what has been said by the gentleman from California [Mr. Dockweiler], that I think my bill meets the very objections that are raised here. My bill was primarily designed for the protection of the laborers and materialmen, and they have a right of action regardless of the completion of the contract. In other words, they can introduce their action 90 days after the work is performed or 90 days after the material is furnished.

Mr. McLaughlin: Or after it has been abandoned——

Mr. Taylor: Within 90 days after it is furnished.

Mr. McLaughlin: Within 90 days after it is furnished, regardless of the completion?

Mr. Taylor: Yes.

Now, Mr. Chairman, I would like to present Mr. Edward H. Cushman, of the Philadelphia and Washington Bars. Mr. Cushman is the author of The Law of Mechanics' Liens in Pennsylvania, a work of recognized authority, and he

has also compiled the statutes of the various States regarding contracts for public works, and bonds for the protection of materialmen; and I would like to leave with the committee a copy of that, as it is very valuable.

(Mr. Taylor passed around to members of the committee copies of a printed pamphlet.)

[fol. 62] Statement of Edward H. Cushman, Philadelphia, Pa.

Mr. Miller: Mr. Cushman, for the purposes of the record, I wish you would further identify yourself.

Mr. Cushman: My name is Edward H. Cushman. I am a member of the bar of Philadelphia and of the District of Columbia, and for a number of years have devoted my practice exclusively to surety law, building contracts and legal problems in connection therewith.

I appear here on behalf of the American Institute of Steel Construction.

Mr. Montague: You did not give your address.

Mr. Cushman: My address is 123 South Broad Street, Philadelphia, Pa.

I also appear in behalf of the Cement Institute, the marble producers, the marble dealers, and with the approval of representatives of other national associations of subcontractors and material men—some of whose members are here to endorse my remarks.

I desire to state that my hands are free. I am permitted to say what I think the law should be, and not what these national organizations might want, although I shall endeavor fairly to present their views. I hope I may appear here as one who is trying his best to remedy a serious condition in a way that will be fair to all interested parties.

The original act was introduced by Congressman Heard in 1894. It merely provided that the performance bond should contain a condition for the payment of labor and material claims. It did not give to the Government priority. This provision was found to be very unsatisfactory to the United States, because subcontractors instituted suits and depleted the penal sum of the bond as against the United States.

As a consequence, the Treasury Department, in 1905, caused to be introduced an amendment to the Heard Act, which amendment is the present law. Under that statute

there is still but one bond taken, upon which the United States has the sole right to sue for a period continuing until 6 months after the final settlement.

This provision, while fair to the United States, in that the bond is always adequate to protect it, has proved to be very unfair to unpaid subcontractors and materialmen. The defects in the present statute are merely procedural. In my opinion, the coverage of the present Heard Act should not be enlarged. However, the procedure should be so modified as to give unpaid laborers and materialmen a speedy and certain remedy. This can be done without in any way affecting the present rights to priority of the United States.

In 1931, I was privileged to appear before a subcommittee of the Committee on the Judiciary of the House of Representatives considering the proposed uniform Government contract bill, and I made there a suggestion for an additional bond system, such as is being discussed here, and which has been the law in Pennsylvania since 1917.

The committee apparently thought well of that proposal; and in all subsequent bills dealing with a proposed uniform contract law, section 14 contains the provisions for the additional bond which we are discussing.

[fols. 63-65] Last year, in view of the fact that there were disputes between the Treasury Department and the Comptroller General, which were delaying the passage of a needed uniform Government contract law—disputes which have nothing to do with the bond requirement, Congressman Taylor introduced section 14 of that proposed uniform-contract bill as a separate measure, and it has been reintroduced in this present session of Congress, as H. R. 2068.

Congressman Dockweiler pointed out today that under the present law a subcontractor or materialman does not have the right to sue until 6 months after final settlement. May I give just one of the many illustrations of the hardships resulting from this provision? A public building in Washington was substantially completed in 1933. The contractor owed the subcontractors $100,000. There was coming to him from the United States upon completion of this building $30,000. Naturally, he delayed completion as long as he possibly could. The subcontractors finally had to complete it for him.

In November 1934 the United States authorized final settlement with the contractor. Consequently, we, as subcontractors, will not have a right to sue until May of 1935, or, roughly, a period of 2 years after most of our labor and material went into that public improvement.

What is the result? The bonding company or contractor came to us and said, in substance, "Your men need your money. If you will take around 80 cents on the dollar, we will pay you now. If you insist on 100 cents on the dollar, while we do not dispute the merits of your claim, you will be required to wait until 6 months after the final settlement." Hence in these days of storm and stress the subcontractors and material men sacrificed part of their meritorious claims in order to get their money promptly.

The second very serious objection to the present procedure is that all parties must intervene in the suit which is first brought. Obviously with one bond, which must protect the United States, there must be a delayed right of intervention to subcontractors in order to give the United States priority.

[fol. 66] I believe the provisions for separate suits suggested by H. R. 2068, introduced by Congressman Taylor, and many of these other bills, are far superior to the provisions requiring all parties to intervene in the suit first brought. A serious procedural problem may arise if all parties are required to intervene in the suit first brought. By allowing separate suits the man who sues first and sues prematurely, or whose claim is defective for any other rea-
[fol. 67] son, suffers a loss himself but he does not carry down with him other subcontractors whose claims are not so defective.

* * * * * * *

[fols. 68-82] No statute which even Congress in its wisdom can enact will cover all the problems of all men at all times. All Congress can do is to endeavor to correct the principal problems which have arisen under the Heard Act.

I hope I have made it clear that this change will not result in an increased premium, an indirect cost to the United States. I hope I have also made it clear that it will not increase the rights of unpaid labor and material men. It

will result in giving them, however, a speedy, certain remedy.

. . . . . .

[fols. 83-104] Bonds of Contractors on Public Works

Friday, March 22, 1935

House of Representatives, Subcommittee No. 1 of the Committee on the Judiciary

Washington, D. C.

Subcommittee No. 1 met at 10:15 a. m. in the committee room, House Office Building, Hon. John E. Miller (chairman of the subcommittee) presiding.

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[fols. 105-108] Bond of Contractors on Public Works

Friday, April 26, 1935

House of Representatives, Subcommittee No. 1 of the Committee on the Judiciary

Washington, D. C.

The subcommittee met at 10 o'clock a. m., Hon. John E. Miller (chairman) presiding.

Mr. Miller: The committee will be in order. This is a continuation of hearings on H. R. 6677, and similar bills. We will hear Mr. Witman, of the Procurement Division.

Statement of E. R. Witman, Assistant Chief, Legal Section, Procurement Division

Mr. Miller: Mr. Witman, will you state your name and official connection?

Mr. Witman: E. R. Witman, Assistant Chief, Legal Section, Procurement Division.

. . . . . .

[fol. 109] Mr. Miller: Is not the law now that the lowest bidder shall get the contract, and is different from the law in a lot of States that the lowest responsible bidder shall get the contract.

Mr. Witman: I think section 3709 of the Revised Statutes merely says that advertisement should be made for bids. It has always come in for a great deal of discussion as to who is going to determine the lowest responsible bidder or what constitutes the lowest responsible bidder.

Mr. Perkins: Of course, all contracts made for buildings for the Government are eventually completed.

Mr. Witman: Yes, sir.

Mr. Perkins: If the contractor falls down, the surety company finishes the job?

Mr. Witman: Yes, sir. If the surety company will not complete it, we have to readvertise the work and charge the difference to the surety.

Mr. Perkins: Does that happen very frequently?

Mr. Witman: Not in a very large percentage of cases. We had more cases in the last 4 years, when surety companies went bad on top of defaulting contractors.

Mr. Perkins: As a matter of fact, is not the difficulty with these contracts a lack of financial responsibility of the contractor?

Mr. Witman: Generally.

Mr. Duffey of Ohio: If this bill were passed by this Congress it would certainly be applicable to the public works program, and that is the reason for its importance.

Mr. Miller: What effect would this have on the general building program of the Government now if we report out H. R. 6677? It is naturally going to cause material men, laborers, subcontractors, and so on, to depend more upon the responsibility of the bonding company under its payment bond than on the financial responsibility and integrity of the original contractor. Just what are we going to run into there?

Mr. Witman: I do not see that that would result. The same bonding company, probably in almost every instance, that furnishes the performance bond will also furnish the bond for the protection of the labor and material men. If they will not bond the company for performance, then they will not bond them for the other requirement. I think this dual bond will not place any more of a burden on the bonding company or the contractor than is carried at the present time.

Mr. Duffey of Ohio: May I submit, Mr. Chairman, that my theory of the law that Congress should pass is that we should not put too much reliance on the surety company.

It is fraught with danger. It is productive of potential lawsuits. It does not safeguard the proper distribution of the funds to the contractor.

Then, we have the very important factor from the standpoint of the Government that the premium on these bonds must be part of the cost of construction. If we can, in some way, work out a system whereby in the administration of the law the distribution of a contractor's money is made with a great deal more care, you can reduce the amount of the bond.

For instance, let us suppose that the bond, in addition to faithful performance, covered the entire cost of labor, [fols. 110-111] and that the Government, upon affidavit, would pay the materialmen direct, with the consent of the contractor, as part of the contract.

It follows quite naturally that the face of the bond is reduced with a resulting saving in the premium. My experience has been, in the many cases I have handled, that your reliance on the bonding company is a very unsatisfactory method of completing these jobs when default takes place.

. . . . . .

[fol. 112] Mr. Duffey of Ohio: I am sure that Mr. Miller and the members of the committee are not taking any pride in the authorship of the bill. We are very desirous of having a statute that will meet conditions, particularly when the Government is going into an expenditure of billions of dollars in the near future. Would it be possible for the department to make concrete suggestions to the committee as to provisions that it would feel were proper?

Mr. Witman: I think so.

Mr. Duffey of Ohio: What is your thought, Mr. Chairman?

Mr. Miller: I think we should like to have the department's ideas on the whole subject.

Mr. Duffey of Ohio: Here is what we would like. If you will submit to the committee either amendments to Mr. Miller's bill, H. R. 6677, or submit a new draft, embodying, as far as you can, the intent of this bill, we will have a committee print printed and then we can proceed with that.

Mr. Witman: Personally, I have not gone into a criticism of the bill as presented. I have a copy of the report here, which I think the committee also has. But I have not studied it from the legal phase at all.

Mr. Duffey of Ohio: Who would be the legal man in the department to do that?

Mr. Witman: I am one of them, but I do not happen to be working on this particular subject. The man who has been is away over the week-end. I am rather pinch-hitting for him this morning, understanding that what you wanted this morning was more fact than criticism of the bill.

Mr. Miller: If you can elaborate on the situation as presented by Mr. McLaughlin, and also as has been touched upon by Mr. Perkins, that is what we would like. The chief reason why this matter is up now is because of the facts mentioned by these gentlemen here; that the subcontractors and the materialmen must wait 6 months after the completion and acceptance of the building before they may file a suit.

Mr. Witman: That is the great objection, especially so far as the small materialman and small subcontractor are concerned, who cannot afford a suit in the long run, after all.

Mr. Miller: What practical suggestions have you to make on that one proposition? Can the problem be solved without doing material injury to the Government or to the Government's interests? That is the question which we should like answered.

Mr. Perkins: I suggest that Mr. Whitman be given time to think over these suggestions with his colleagues and then come back later on.

Mr. Duffey of Ohio: Not later than a week from today, may I suggest, if we are to get this bill through this session.

Mr. Miller: Can you do that, and then return here a week from today?

Mr. Witman: Yes, sir.

[fol. 113] Mr. Miller: In the meantime, give this problem some thought. We have a number of these bills, and H. R. 6677 is in the way of a résumé of most of them. As Mr. Duffey has said, there is no pride of authorship in any of them. If we do anything, we want to get something that will reach the difficulty.

Mr. Witman: The way we in the Treasury Department felt, this bill was a long step in advance. It is not the ideal bill. It perhaps does not go as far as it should, in view of the difficulties. But, considering the way bills can be killed or held up, we thought that if this could be passed it would be a step forward and perhaps we could get something further later on.

[fols. 114-128] Bonds of Contractors on Public Works

Friday, May 3, 1935

House of Representatives

Subcommittee No. 1 of Committee on the Judiciary

Washington, D. C.

The subcommittee met at 10 a. m., Hon. John E. Miller presiding.

Other members of the subcommittee present: Mr. Duffey of Ohio, Mr. McLaughlin, Mr. Perkins, and Mr. Robsion of Kentucky.

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[fol. 129] Bonds of Contractors on Public Works

Friday, May 3, 1935

House of Representatives

Subcommittee of Committee on the Judiciary

Washington, D. C.

Following the consideration of other business, the subcommittee took up the various bills dealing with bonds for contractors on public works, Hon. John E. Miller presiding.

Other members of the subcommittee present: Mr. Duffey of Ohio, Mr. McLaughlin, Mr. Perkins, and Mr. Robsion.

Mr. Miller: Last Friday we had Mr. Witman here in connection with H. R. 6677, H. R. 6115, H. R. 5054, H. R. 2068, H. R. 6048, and H. R. 4461, all of which are bills dealing in a general way with amendments to the Heard Act, and we were trying to consider them all together, trying to arrive at some conclusion.

Mr. Witman: Mr. Chairman, last week I explained that I was pinch-hitting for the gentleman who really did the work on this matter for the Treasury Department. Mr. Laws is here; he is the chief of the legal section of the Procurement Division.

Mr. Miller: Mr. Laws, we will be glad to hear from you, and I am going to suggest that you go ahead and present your suggestions in the way you wish.

Statement of William K. Laws, Chief of Legal Section, Procurement Division, Treasury Department

Mr. Laws: I think first, that I ought to make it clear that so far as the trust-fund theory is concerned, making it larceny to misapply construction funds, I am not speaking for the Treasury Department, but will, if desired, present my personal views. So far as the rest of the subject matter is concerned, that has been made the basis of a report from the Treasury, which was prepared by me personally.

Mr. Robsion: May I inquire why the gentleman states that he speaks personally, and not for the Treasury Department?

Mr. Laws: Because this particular trust-fund theory was not submitted to the Secretary. The Celler bill makes specific reference to it.

Mr. Perkins: What is your connection with the Treasury Department?

Mr. Laws: Chief of the Legal Section, Procurement Division.

Mr. Miller: What are your personal ideas about this?

Mr. Laws: As to the trust-fund theory, I think, first, that it is an entirely erroneous theory to create any additional crimes. I think that that is purely a civil action. I think [fol. 130] that it is very much the same as though Congress would pass an act which declared my salary to be a trust fund, and that if I did not pay my rent and so on it would be larceny. I think it comes down to that. But, so far as the practical aspect of it is concerned, I think it would do a great deal of good. I do not believe that there would be many convictions, but I think that it would——

Mr. Perkins: Cause lots of scares?

Mr. Laws: I think it would cause lots of scares. I think that it would be the same way as with the various other crimes. I believe that we would have more burglaries if it did not constitute a penal offense, so that I really believe it would be a very constructive thing, and help the Treasury Department insofar as the payment of subcontractors is concerned.

Mr. Robsion: Do you have any question as to the constitutionality of it?

Mr. Laws: No, sir. I think it is entirely constitutional. But my point is that I think that it is making a crime of something which is not morally reprehensible to any greater

extent than the failure to pay one's debts is morally reprehensible, and it has been a long time since it has been a crime not to pay debts.

Mr. Perkins: It would be too bad generally if it were a crime now.

Mr. Laws: That is the reason that I am personally opposed to the Celler bill.

On the other hand, I am entirely convinced that payments would be made much more promptly than they are now if it were passed, but I think that you would have very few convictions and prosecutions.

As to the rest of the bill, I think that the Heard Act very definitely is not fulfilling its mission. The provision requiring 6 months after final settlement of the contract before suit can be brought leads to a situation where I am sure any attorney would advise a small claimant, "If you can get 50 percent of the amount of your claim today from the surety company, better take it, because it may be 2, 3, or 4 years before you can collect it in court", and that is the situation that I think exists under the present Heard Act.

I know of no method whereby the Heard Act can be made to function with anything like perfection, because there is an element of expense involved and litigation delays which cannot be overcome, but I do feel that the Taylor bill, which is H. R. 2068, in substance would go about as far toward correcting the situation as could be done.

But there are several things in that bill which I think tend to defeat its purpose. The primary difficulty with it is that it would, I believe, require final settlement before a judgment could be collected, because it provides for a proration of the amounts of the various judgments against the entire amount due under the bond, and I do not believe that a court would be inclined to permit a judgment to be collected until after the time had expired within which judgment might legally be procurable.

Now, we have prepared, I think at the suggestion of the subcommittee, a draft which gives effect to the views of the Treasury, which draft is very substantially the Taylor bill amended in the manner suggested in the report of the Treasury Department, and which also includes a section [fol. 131] dealing with the trust-fund theory, and making it larceny to misapply construction funds.

Mr. Miller: I might say that H. R. 6677, which I introduced, I did not prepare myself, and I have no interest in

the matter; but it was prepared to try to cure those objections to the Taylor bill which had been brought to our attention. But, if your Department has worked out a bill, we would be very much interested in it.

Mr. Duffey of Ohio. Very much so.

Mr. Miller: Suppose that you, then, confine yourself to the suggestions that your Department has worked out, Mr. Laws.

Mr. Robsion: Would it take too long to read the proposed bill?

Mr. Laws: I would be glad to do so.

Mr. Duffey of Ohio: Is that a draft you have prepared that you think would be a solution?

Mr. Laws: I do not think that there is a solution, sir, but I think that it would be——

Mr. Duffey of Ohio: Helpful?

Mr. Laws: I think that it would be a very great improvement.

Mr. Duffey of Ohio: Would it not be expedient to have the bill introduced, so that it can come with the rest of the bills before the committee?

Mr. Laws: If the committee thinks well of it——

Mr. Miller: Let us take up your draft and read it, and we will discuss it as we go along.

Mr. Laws: It is entitled "A bill for the protection of subcontractors, labor, and materialmen employed in public works", and it reads:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish the following bonds, which shall become binding upon award of the contract to such person:

(a) A performance bond, with a surety or sureties satisfactory to the officer awarding such contract and in such amount as he deems adequate for the protection of the United States, guaranteeing to the United States complete performance of such contract.

Mr. Miller: Let me interrupt you to ask one question there. We have had some discussion as to whether or not

we should vest that discretion in the awarding officer; or as to whether or not we should say that the performance bond shall be a certain per cent of the contract price.

Mr. Laws: I think that that would perhaps be a mistake, because there are certain types of contracts where it seems desirable to obtain larger performance bonds than in others. In probably 99 out of 100 of the contracts that I have seen in the Procurement Division, I should say that it is 50 per cent of the amount of the construction contract, but there is that 1 per cent in which it may be 100 or 150 per cent of the amount of the construction contract.

Mr. Perkins: How long have you had your present connection?

Mr. Laws: Since August 13, last year.

Mr. Miller: Go ahead. We will ask questions as we go along.

Mr. Laws (reading):

(b) A payment bond—

I think that here your suggestion would come in very well, on the payment bond, and if it seems desirable to fix [fol. 132] the precise amount of it, I see no objection to doing so, and not leaving it to the discretion of the awarding officer.

A payment bond, with a surety or sureties satisfactory to such officer and in such amount as he deems adequate for the protection of all persons supplying labor, services, or materials in the prosecution of the work provided for in such contract, whether or not such labor, services, or materials enter into and become component parts of such work, guaranteeing to the United States for the use of each such person payment in full for such labor, services, and materials.

There we have added the word "services", which I think is not in the various other bills that I have seen.

Sec. 2. (a) Any person, copartnership, association, or corporation who has supplied labor, services, or material for the performance of any contract in respect to which a payment bond has been furnished under this act and who has not been paid in full therefor, shall have the right to sue on said payment bond in the name of the United States for his, their, or its use and benefit, in the district court

of the United States for the district in which the contract was to be performed, irrespective of the amount in controversy, and not elsewhere, and to prosecute the same to final judgment for such sum or sums as may be justly due him, them, or it, and to have execution thereon. The United States, however, shall not be liable for the payment of any costs or expenses of any such suit.

Mr. Perkins: You have not fixed any time limit there?

Mr. Laws: No, sir; that follows a little later.

Mr. Robsion: Have you thought about the number of suits that that would bring into the United States courts?

Mr. Laws: Yes, sir. There would be serious objection to that.

Mr. Robsion: You could bring suits for $10 or $15.

Mr. Laws: That is true under the present act. However, a private practitioner would have more experience with the actual handling of the Heard Act suits. All that we ever have to do with the actual suits is when we are requested to furnish certified copies of bonds and contracts to those who have filed claims so that I am not qualified to advise as to the practical danger of multiplicity of suits.

(b) No suit *suit* shall be commenced prior to ninety days from the time when payment was due for the labor, services, or material for which the claim is made, and every such suit shall be commenced not later than twelve months from the date of final settlement under the contract.

Mr. Miller: Is not the language "from the time when payment was due" a little bit ambiguous? Could you not say "90 days from the time the labor or services were procured or furnished"?

Mr. Laws: I personally prefer this method of expression, because in the case of an installment contract, where payments are due from time to time, the language used in some of these other bills might be construed, I think, to mean the final completion of that contract, even though under the terms of the subcontract payments were due in the interim. That was the reason for my using this language.

Mr. Miller: In other words, that would be determined by the terms of the contract?

Mr. Laws: Yes, sir; that was the thought.

Mr. Robsion: Would that not also permit the splitting up of the total amount?

Mr. Laws: Yes, sir. In addition to suing the principal, as could be done under existing law as each installment comes due, suit could be brought on the bond.

[fol. 133] Mr. Robsion: He can sue the person who is first liable, the principal?

Mr. Laws: Yes, sir. [Continues reading:]

Sec. 3. The Comptroller General shall furnish to any person making application therefor, who submits an affidavit showing facts such as to permit him to sue on a payment bond under this act or that he is being sued on any such bond, a certified copy of such bond and the contract in respect of which it was given, which copies shall be prima facie evidence of the contents, execution, and delivery of the originals, and, in case final settlement of such contract has been made, a certified statement of the date of such settlement, which shall be conclusive as to such date. Applicants shall pay for such certified copies and certified statements such fees as the Comptroller General fixes to cover the cost of the preparation thereof.

Mr. Duffey of Ohio: What do you mean by the "Comptroller General"?

Mr. Laws: The Comptroller General of the United States: the General Accounting Office. That should be corrected to "the Comptroller General of the United States", or "the General Accounting Office."

Sec. 4. (a) The sureties on any bond executed pursuant hereto may pay into court for distribution among all claimants the full amount of their liability thereunder. Upon so doing, they will be relieved from further liability.

(b) Judgments recovered by claimants under this act shall have priority among themselves in the order of their entry.

I would like to comment on that section (b). The result of that in perhaps an extremely exceptional case would be that there would be earlier creditors who would get earlier judgments, and there would be no money left for the unfortunate subsequent creditor who was rather slow in filing his claim, but I can see no other way of giving prompt relief to creditors in general, because the alternative to that is to make them all wait until 6 months, or whatever the

period is fixed at after the date of the settlement of the contract.

Mr. Robsion: Of course, that presupposes the idea that the party giving the bond will not pay.

Mr. Laws: No; I was supposing a case which I have never heard of, but which I imagine has happened. I was thinking of a case where the bond was not for a large enough amount to cover all of the claims.

Mr. Robsion: But it presupposes that a bond will be taken that will not accomplish what you are trying to do here?

Mr. Laws: Yes, sir.

Mr. Robsion: Of course, this is to meet that situation if it should arise, but it ought not to arise at all if they give sufficient bond.

Mr. Laws: I do not know. It is conceivable to me that it might arise. I do not know of any case in which that has happened; do you, Mr. Witman?

Mr. Witman: No.

Mr. Laws: Even where the bonds are for the protection of the United States as well as for the protection of creditors.

Mr. Duffey of Ohio: Do you not think that subdivision (b) of section 4 should be so written that if all creditors come in within a certain period of time, they should have not priority but an opportunity to participate in the distribution?

Mr. Laws: I do not think so, for this reason, that that would mean that you would have to make each creditor withdraw his claim until after the contract had been finally concluded, a reasonable time after that, say a couple of [fol. 134] months after that, which would defeat what I understand the purpose of the amendment is. I think that if you do that, the present law might be left as it is.

Mr. Duffey of Ohio: Do you not recognize the practical proposi-on that some of the creditors are either negligent or do not have the opportunity to hire legal counsel properly to present their claims, and they should not be denied the opportunity of participating in the distribution of the funds?

Mr. Laws: I agree 100 per cent, but I do think this, that if you withhold any distribution until all of the creditors that may conceivably become creditors are known, that means that you are going to withhold distribution until after your contract has been concluded.

Mr. Duffey of Ohio: But if they have their opportunity to present their claims within a time limit. and then make the distribution, rather than to make it in the order of priority of the filing of the claims, what would be the objection to that?

Mr. Laws: This order of priority was merely to negative any distribution on a pro rata basis. I put in there that judgments should be paid in the order of entry of claims so as to negative any indication that no judgments were to be paid until the full amount of liability was ascertained.

Mr. Robsion: The purpose of this legislation is to give the subcontractors and the workers their money as the work goes along?

Mr. Laws: That is as I understand it.

Mr. Robsion: That is your purpose?

Mr. Laws: Yes, sir; so that they can immediately obtain and collect judgments.

Mr. Robsion: It keeps each fellow paying up as he goes along.

Mr. Perkins: Furthermore, if these people are not paid, it precipitates the whole situation so that the contractor is eliminated?

Mr. Laws: Yes, sir; I think that that would be the practical answer.

Sec. 5. (a) The head of the department or bureau having charge of the work may, in his discretion, require a performance or payment bond in cases other than those specified in section 1 hereof.

Mr. Robsion: What is the idea there?

Does that contemplate that, in event you have not taken sufficient bond under section 1, you could take another bond?

Mr. Laws: No. I think that that merely means this, to give you an example: Suppose that we had a $1,000 contract that we thought ought to be bonded. This would authorize the head of the Department to require a bond. That is about the only case that I can think of. There might be other cases that would be covered by that, but offhand none occurs to me.

(b) Performance and payment bonds may be waived for work to be done in a foreign country when the head of the department finds that the procurement thereof is impracticable.

Sec. 6. Any unpaid portion of the contract price, including any sum due for additions to the contract, shall be applied, first, to the completion of the public work; second, to the payment of unsatisfied judgments recovered by claimants against the contractor for labor, services, or material on the public works; third, to the payment of unsatisfied judgments recovered by claimants under the payment bond; and, fourth, to reimbuse the surety for any claim or claims paid by it under either the performance bond or the payment bond.

[fol. 135] Mr. Robsion: Under that, here is the Government having the work done, and the Government officer or the Government agent takes a bond which later proves to be inadequate. Then Uncle Sam comes in first?

Mr. Laws: Yes, sir.

Mr. Robsion: I do not like that.

Mr. Laws: But not under the bond; that is with reference to moneys still due under the contract.

Mr. Robsion: That does not have any reference to the bond?

Mr. Laws: Not any reference to the bond. The only place where the bond would work into it would be if some claimant had gotten a judgment against a surety which was not satisfied, and the United States would pay it, instead of directly to the contractor, to the person who would secure the judgment, and also pay directly to the surety in event the surety had made certain payments.

Sec. 7. (a) Prior to each payment under a contract in respect of which a bond is required to be given by the provisions of this act, the contracting officer acting under such contract on behalf of the United States shall require the contractor to certify that, to the best of his knowledge and belief, the claims then due of those who have supplied labor, services, or materials in connection with such public work have been paid, and that the sum being paid will be applied first to the payment of all such claims becoming due as the result of such payment.

The purpose that I had in mind in putting that clause in was to put all contractors on notice of the requirement of this trust fund which comes as clause (b).

(b) The funds received by a contractor from the United States or by a subcontractor from a contractor under any

contract in respect of which a bond is required to be given by the provisions of this act shall constitute trust funds in the hands of such contractor or subcontractor, and shall be applied first to the payment of the claims of those who have supplied labor, services, or materials in connection with such public works. Said trust shall be deemed discharged only when such claims are paid.

(c) False certification as to the facts required to be certified by paragraph (a) of this section or the application by any contractor or subcontractor of funds in violation of the provisions of paragraph (b) of this section shall constitute a penal offense punishable by a fine of not to exceed $1,000 or imprisonment for a period of not to exceed one year.

Mr. Perkins: "Or both."

Mr. Duffey of Ohio: Say "one year and one day."

Mr. Laws (reading):

Sec. 8. This Act may be cited as the "Public Works Bonding Act."

Sec. 9. This Act shall take effect upon the expiration of thirty days after the date of its approval, but shall not apply to any contract awarded pursuant to any invitation for bids issued on or before the date it takes effect, or to any persons or bonds in respect of any such contract. The Act entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works", approved August 13, 1894, as amended (U. S. C., title 40, sec. 270), is repealed, except that such Act shall remain in force with respect to contracts for which invitations for bids have been issued before the date this Act takes effect, and to persons or bonds in respect of such contracts.

Mr. Miller: You have not treated the question of notice to the contractor of suits that might be filed by material men that had no direct contractual relationship with the contractor.

Mr. Laws: My reason for not doing that, except as the Treasury Department did report against it, is that I think the result of it would probably just about come down to this, that over nine-tenths of your laborers and the ma-

terial men doing business on a small scale that were not [fol. 136] in constant touch with their lawyers would not know of the requirement, and they would wake up to find that their period had expired within which to give such notice, and they would be barred. That seemed to me to be the effect of the provision as it stood in the Taylor bill.

Mr. Perkins: I would like to ask several general questions.

Are there many cases of Government contracts where the contractor does not eventually pay, or the surety company pay?

Mr. Laws: I think very few, but I suspect, without knowing, that very frequently payments are made on the basis of 60, 70, or 80 cents on the dollar. I never have seen any proof of that, but I am quite well satisfied that that is the case.

Mr. Perkins: So far as the Government is concerned, practically all of the contractors and material men are paid when the contract is finished?

Mr. Laws: I think that that is the fact.

Mr. Perkins: In many instances, however, the payments are not made 100 per cent but less?

Mr. Laws: And very long delayed?

Mr. Perkins: Do you think that the giving of the second bond, the bond for payment, would increase the cost of the job?

Mr. Laws: I have tried to check up on that, and I have received different answers from three insurance men that I spoke to. Two of them said that it would not increase the cost to the United States. One said he thought it probably would, because there would be a little greater amount of liability, as experience would prove. He did not think that the rate would be increased immediately, but he thought that after they had had some experience with the legislation which granted prompt relief, so that there would not be the same opportunity for chiseling—and here I am using my own language in conveying his thought—the probabilities are that the rates would be advanced.

Mr. Perkins: Some people had the objection that they thought that if the men were paid in full early on the job, like on the foundation, the whole job might finally be rejected on account of defective work which would have been paid for under this act. What do you think about that?

Mr. Laws: I think that there is a difficulty there, which as a practical matter is very difficult to decide, and undoubtedly there will be some cases where payments have been made that should not have been made, but at the same time the contractor has the specifications there, and if it is a subcontract for the foundation, he has been paid as his work progressed a large portion of the foundation cost by the United States and after inspection.

Mr. Perkins: What is that proportion? Eighty-five per cent?

Mr. Laws: It starts out with the reservation of 10 per cent, so that the payments are made as the work progresses to the extent of 90 per cent, and then after 50 per cent of the work is completed, if it is satisfactorily completed and satisfactory progress is being made, on request the last 50 per cent is paid in full. But the 10 per cent of the original 50 per cent is reserved.

Mr. Duffey of Ohio: What would you say, from your experience in the Procurement Division, about the fundamental principle in these matters of having the Government bond itself?

[fol. 137]. Mr. Laws: Of course, that is what I am 100 per cent in sympathy with. I do not like these bonds. I have not any idea what would be the views generally of the Procurement Division. I have discussed it with several people there, and found that there was a divided sentiment.

There is one thing that the surety companies assist us materially in, and that is in determining whether the bidder is financially qualified, because the probabilities are that if he gets a bond he is well qualified financially.

Mr. Duffey of Ohio: Do you not think that the Government should know the responsibility of the contractor?

Mr. Laws: We do make a check on them, but I do think that the acid test frequently is whether that man has been able to show enough cash to the surety company or indications of cash so that he can get a bond.

Mr. Robsion: Over a period of years they have had opportunities to check up on these fellows and know all about them, as to whether they are morally and financially responsible.

Mr. Perkins: Would not the practice of having the Government bond itself tend to throw the contracts more into politics?

Mr. Laws: I do not think it would.

Mr. Perkins: I will not refer to any of the cases that appeared in the newspapers, but there were a number of cases where it appeared that contracts were rejected three times until some particular contractor got the job. I do not know how much merit there is in that.

Mr. Laws: Of course, there was no merit in that. I know the situation to which you are referring, and there were no political considerations involved.

Mr. Miller: You were diverted from a very important statement in connection with a question propounded to you by Mr. Perkins, in connection with a man furnishing, say, cement for the foundation.

Mr. Laws: Yes. If, despite the fact that the contractor's representative has checked that work on the foundation, the work of his subcontractor, and despite the fact that the construction engineer representing the United States has checked it and made a favorable report, and on the basis of that report 90 per cent has been paid by the United States—if, despite all that, the foundation does turn out to be defective before the job is completed, the result would be that the contractor had paid his subcontractor before he should have been paid.

Mr. Miller: Would that happen very often?

Mr. Laws: I should say very rarely if ever. I have never heard of such a case.

Mr. Miller: We have thought about that question some. We have visioned where it might happen, but you think it would be a rare instance?

Mr. Laws: Yes, sir; and I do not believe that anything in this bill in any event would affect it.

Mr. Robsion: It could hardly be without collusion.

Mr. Laws: I should think not, but in any event, this bill does not specify anything, as to the contractual provisions for payment as between contractor and subcontractor. I suppose that if this bill were passed, that would be handled in the same way as at present by the contractor. So far as the bill is concerned, contractors could provide that no [fol. 138] payment should be made to the foundation subcontractors until a year after the work was completed.

Mr. Perkins: Have you any knowledge as to what proportion of these contracts are not finally paid out by the contractors?

Mr. Laws: No.

Mr. Perkins: And how many are eventually made good by the surety company?

Mr. Laws: I can get that information very readily. It is a comparatively small number. I could not give it sufficiently accurately, but I did see a report to some committee in Congress, I think, just a day or two ago.

Mr. Miller: Is not that in this report that was made to Mr. Mead's committee?

Mr. Laws: I think that that is the one that I had reference to. It seems to me that I saw that yesterday.

Mr. Perkins: You think that there is ground for remedial legislation by reason of the delay in payment to subcontractors and materialmen?

Mr. Laws: Yes.

Mr. Robsion: And that is the primary purpose of this amendment?

Mr. Laws: Yes, sir.

Mr. Miller: We were discussing this, Mr Laws, just as lawyers. This committee, I think, is rather loath to disturb existing law and existing court decisions where we can correct the difficulty without doing so, and we had discussed trying to amend the present Heard Act by inserting a brief provision in it. Personally, I have thought about it some, and I do not see how we can do it without going into the situation about as fully as you have gone into it, or about as fully as it is gone into by some of these bills.

This H. R. 6677 follows the language of the Heard Act whenever it is possible to do so, and I notice that you follow the language of the Heard Act whenever it is possible to do so.

Mr. Laws: Yes, sir.

Mr. Miller: I want to ask you about this provision in your draft which is in subsection (b) of section 1, where you provide for a payment bond. Now, this H. R. 6677 provides that—

A payment bond with a safety or sureties satisfactory to such officer, for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Said payment bond shall be in a sum not less than one-half of the total amount payable by the terms of the contract: *Provided*, That whenever the total amount so payable shall be not less than $5,000,000 nor more than $10,000,000, a bond in a sum not less than one-fourth of the amount payable under

the terms of the contract may be accepted and if the amount payable under any such contract exceeds the sum of $10,000,000 a bond in the sum of $2,500,000 may be accepted.

Mr. Laws: I think that that would be a good provision.

Mr. Miller: In lieu of your subsection?

Mr. Laws: Yes, sir.

Mr. Miller: Have you compared this H. R. 6677 with your draft?

Mr. Laws: I read it rather carefully, and, quite frankly, I had intended to take the "provided" clause from section 2 of H. R. 6677, and the rest really follows it closely, with the exception of one or two points that we discussed.

Mr. Miller: This proposal with respect to notice to the contractors is one that has given me a great deal of trouble. [fols. 139-140] Mr. Laws: I can see elements of unfairness in not requiring notice.

Mr. Miller: Have you any other suggestions to offer?

Mr. Laws: No, sir. I might just say, as a practical consideration, that I do not believe many people are going to sue without getting in touch with the person whom they are going to sue in advance of instituting action.

(Thereupon, after an informal conference among the members of the subcommittee, further consideration of these bills was deferred until Monday morning, May 6, 1935, when the subcommittee agreed to meet in executive session.)

[fol. 141] In United States District Court

Plaintiff's Exhibit Noland No. 5—Filed October 29, 1940

House of Representatives

74th Congress, 1st Session

Report No. 1263

Bonds of Contractors on Public Works

June 19, 1935.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

Mr. Miller, from the Committee on the Judiciary, submitted the following

Report

[To accompany H. R. 8519]

The Committee on the Judiciary, having considered H. R. 8519, requiring contracts for the construction, alteration,

and repair of any public building or public work of the United States to be accompanied by a performance bond protecting the United States and by an additional bond for the protection of persons furnishing material and labor for the construction, alteration, or repair of said public buildings or public work, reports the same favorably to the House with the recommendation that it do pass.

This proposed legislation supersedes the Heard Act, which it repeals, dealing with bonds of contractors on public works. After considerable complaint with regard to the working of the Heard Act had come to the Committee on the Judiciary, particularly from subcontractors who have experienced in many cases what seems to your committee to be undue delay, with resultant hardships, in the collection of moneys due them by suits on bonds under the procedure prescribed by the Heard Act, the committee appointed a subcommittee to consider all of a number of proposed amendments which had been introduced in the House and referred to the committee. Extensive hearings were held by the subcommittee, at which representatives of contractors, surety companies, and the Government were heard.

The Treasury Department expressed its accord with the purpose sought to be accomplished in the following language contained in a letter dated March 23, 1935, addressed by the Secretary to the chairman of the committee with regard to H. R. 2068, one of the bills considered by the subcommittee, and which is superseded by the reported bill, H. R. 8519:

> The major purpose of the bill seems to be to afford greater protection to subcontractors, laborers, and materialmen by shortening the period within which action may be instituted by them against the surety. With this purpose [Vol. 142] the Treasury Department is fully in accord, as there have been many instances in which several years have elapsed after the performance of the work before a judicial remedy was available under the existing law.

Procedure with Existing Law

The Heard Act is set out in full at the end of this report in compliance with the Ramseyer rule. It will be observed that under this act, there is but one bond provided by the contractor, which serves as protection both for the

United States and for subcontractors, material men, and laborers.

If suit is brought by the United States on the bond other claimants may intervene and have their claims adjudicated, subject to the priority of the United States. If, however, no suit is brought on the bond by the United States, the claimants must wait until 6 months after the completion and final settlement of the contract before they may initiate suit. In the case of works requiring a long period of time to complete, this may mean a delay of years before the subcontractors, material men, and laborers are even permitted to bring suit on the bond, and months more of delay occur before judgment is entered. Under such circumstances it appears that claimants frequently find themselves under the necessity of choosing whether they will wait years for their money or accept compromises which, if they do not involve greater loss, at least destroy the profitableness of the contract. Those in financial stringency, of course, have no choice but the latter alternative.

Procedure under H. R. 8519

Under this bill the contractor on all contracts of more than $2,000 will furnish two bonds:

(*a*) A performance bond satisfactory to the officer of the Government awarding the contract in such amount as he shall deem adequate for the protection of the United States; and

(*b*) A payment bond for the protection of all persons furnishing labor or material in the prosecution of the work provided for in such contract. The amount of the payment bond is determined by the amount of the contract, as follows:

Contract:	Bond
Not more than $1,000,000	One-half of amount of contract.
Between $1,000,000 and $5,000,000	40 per cent of amount of contract.
Over $5,000,000	$2,500,000.

The right to sue on the payment bond and prosecute his action to judgment and execution accrues to any person protected by the bond 90 days after the last of his labor was performed or material supplied if he has not been paid within that time. The suit must be brought in the district court of the district where the contract was to be performed and may not be commenced after the expiration

of 1 year from the date of final settlement of the contract.

One protected by the bond must be vigilant in the prosecution of his rights thereunder or take the chance of finding the bond depleted by the executions of those more prompt than he, or perhaps find the door entirely closed against his suit by limitation. "Equity aids the vigilant."

[fols. 143-144] A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far as the bill goes. It is not felt that more remote relationships ought to come within the purview of the bond.

In compliance with clause 2a of rule XIII, existing law which it is proposed to repeal is set out in full below:

United States Code, Title 40, Section 270

Bonds of contractors for public buildings or works; rights of persons furnishing labor and materials: Any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claim and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor

and materials shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the district court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: *Provided*, That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: *And provided further*, That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: *Provided further*, That in all suits instituted under the provisions of this section such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor.

[fol. 145] IN UNITED STATES DISTRICT COURT

Statement of Proceedings and Testimony—Filed May 2, 1940

APPEARANCES:

Prentice E. Edrington, Esq., On Behalf of all the Defendants. Alexander M. Heron, Esq., and William L. Owen, Esq., On Behalf of Noland Company, Incorporated. Jackson E. Price, Esq., Assist. Solicitor, Interior Department.

STIPULATION

Mr. Heron: It is hereby stipulated that notice of the time and place of the taking of these depositions, and the names of the witnesses, is hereby waived, and these depositions may be taken before Christabel E. Hill, a Notary Public in and for the District of Columbia.

Endorsed: Filed May 2 1940 Charles E. Stewart, Clerk.

Whereupon, FLOYD E. DOTSON, being of lawful age, was produced as a witness by and on behalf of the Noland Company, Incorporated, having been first duly sworn by me, a Notary, was examined and testified as follows:

Direct examination.

By Mr. Heron:

Q. You are Mr. Floyd E. Dotson?
A. That is right.
Q. What is your address?
A. My business address is 18th and C Streets, N. W.—Department of Interior.
Q. What is your official occupation?
A. Chief Clerk of Interior Department.
Q. How long have you held that position?
A. Since July 1, 1935.
Q. I refer your attention to the contract of Irwin & Leighton with the United States acting through the Interior Department for the construction of the library building at

Howard University, dated December 5, 1936, and ask you what, if any, connection you had with the preparation of this contract?

A. I served on the Board appointed by the Secretary of [fol. 146] the Interior to consider bids and recommend an award for this building. The contract forms were prepared in my office.

Q. Do you know from what source the funds for this job were made available?

A. From Public Works Administration allotment, made under date of October 28, 1933.

Q. By whom was that allotment made?

A. It was made by the Administrator of Public Works.

Q. Why was payment bond on Standard Form No. 25A required?

Objection by Mr. Edrington: Objected to on the grounds that witness would not know why a bond was taken, besides it is immaterial and irrelevant.

A. Since public works funds were involved it was required by Public Works Administration Bulletin No. 51.

By Mr. Heron: That is all.

Cross-examination.

By Mr. Edrington:

Q. The Interior Department has made many allotments to State aid jobs under the National Industrial Recovery Act, has it not?

A. No, not the Interior Department.

Q. Well, the Federal Administrator of Public Works, Mr. Harold L. Ickes, has made numerous allotments to states and municipalities for building various types of buildings, has he not?

A. I know nothing about that.

Q. Why do you know about this particular thing then, the library building at Howard University?

A. This project was handled in my office.

Q. Don't you know that Bulletin No. 51 applies to all Public Works Administration projects?

A. I cannot say.

Q. Don't you know that payment bond under the Miller Act is not required on all WPA projects?

A. I cannot say.

Q. Will you point out in Bulletin No. 51 where it says that payment bond under Miller Act is required to be given in connection with this contract? You have before you Bulletin No. 51, can you point out the section that you referred to that you claim requires payment bond be given?

A. Section 2A.

Q. May I have that copied off in evidence, the Section you referred to?

A. Also Section 5.

[fol. 147] Mr. Edrington: In connection with witness' testimony I offer in evidence the document from which witness read, entitled "Federal Emergency Administration of Public Works," Harold L. Ickes, Administrator, Washington, Bulletin No. 51, issued by the United States Government Printing Office, Washington, 1935, and ask that it be marked Defendants' Exhibit #1.

(Sections referred to above follow)

Sec. 2. (a) The forms required for general use in connection with construction and repair projects are as follows:

U. S. Government Combined Form No. P. W. A. 50.
U. S. Government Form of Contract No. P. W. A. 51.
U. S. Government Standard Form of Bid Bond No. 24.
U. S. Government Standard Form of Performance Bond No. 25.
U. S. Government Standard Form of Payment Bond No. 25 A, for the protection of labor and materialman, pursuant to Public Act No. 321, Seventy-fourth Congress, approved August 24, 1935.

Sec. 5. Neither bid nor performance bonds shall generally be required when the execution of Form No. P. W. A. 51 is not required or is waived, but the contracting officer must, when required by statute, or in the absence of a statute may, in his discretion, require either or both of such bonds.

Q. Don't you know that particular Bulletin and what is in it refers to public works of the United States, that is to buildings owned and operated by the United States?

Objection by Mr. Heron: I object to that question on the grounds that the Bulletin is self-explanatory.

A. I cannot answer that question.

Q. What specific appropriation did the money come from for the building of the library at Howard University? As a matter of fact do you know whether the appropriation or allotment for the building of the Howard University library came out of $3,300,000.00 appropriated by Congress under Act of January 16, 1933—the Act generally known as the National Industrial Recovery Act?

A. I am of the opinion that it came from that fund. [fol. 148] Though a portion of it may have been a different allotment.

Q. The procedure as I understand it was that the Secretary of the Interior acting as Federal Administrator of Public Works recommended to the President certain allotments, and he, the President, approved or rejected them?

A. That is right.

Q. That was one of the allotments approved by the President?

A. That is my understanding.

Q. Has the Interior Department any record of receiving from the Howard University a resolution of its Board of Trustees, or any action of that corporation, consenting that the building should be a government building?

A. As far as I know, I don't recollect any such action of the Board of Howard University.

Mr. Edrington: That is all.

Re-direct examination.

By Mr. Heron:

Q. These allotments which were made, were made by the Secretary of Interior acting in his capacity as Federal Administrator of Public Works, were they not?

A. That is correct.

Q. They were made from the general appropriation of Congress in order to put N. I. R. A. program into effect, is that correct?

A. That is correct.

Q. Was there any specific appropriation of Congress for this library building at Howard University, as far as you know?

A. There was an appropriation made in the year 1930 or 1931 or 1932. The amount appropriated was later impounded and not used.

Mr. Heron: That is all.

There being no further interrogatories propounded the witness was dismissed.

Floyd E. Dotson, *Signature of Witness.*

Subscribed and sworn to before me this 2nd day of May, 1940. Christabel E. Hill, *Notary Public.* (Notarial Seal.)

[fol. 149] The testimony of JOHN J. MADIGAN, taken before Christabel E. Hill, a Notary Public, as Commissioner, on the 30th day of April, A. D. 1940, at 11 o'clock A. M., Eastern Standard Time, at Room 6009, Old Interior Department Building, Washington, D. C., to be read in evidence on behalf of the Use Plaintiff in the above entitled action is as follows:

Direct examination.

By Mr. Heron:

Q. Will you please state your name and address?

A. John J. Madigan. My home address is 3601 Connecticut Avenue, Washington, D. C.

Q. What is your occupation?

A. Executive Officer, Public Works Administration.

Q. How long have you held that office?

A. Since the middle of May, 1935.

Q. Do you have in your custody official records?

A. I do.

Q. Do you have among them Public Works Administration Bulletin No. 51, issued in December, 1935?

A. I have the revised edition as of October 1, 1935.

Q. That is right I see it is October. Do your records disclose by what authority that Bulletin was issued?

A. They do.

Q. By what authority was it issued?

A. By the authority of the Federal Emergency Administrator of Public Works.

Q. Who was the Administrator?

A. Harold L. Ickes.

Q. From what paper are you reading?

A. From the draft of the Bulletin No. 51, as printed by the United States Government Printing Office. Washington, 1935.

Q. How do you identify the authority under which the Bulletin No. 51, dated October 1, 1935, was issued?

A. By familiarity with the signature of the official who approved the issuance of the Bulletin, Harold L. Ickes.

Q. Is the signature of Harold L. Ickes appearing on this draft his genuine signature?

A. It is.

Q. Can you furnish us with a copy of that Bulletin, No. 51?

A. Yes.

[fol. 150] Q. I hand you what purports to be a printed copy of Bulletin No. 51, United States Government Printing Office, dated Washington: 1935, and ask you if it is a copy identical in content with the original Bulletin which you have just described, bearing the signature of Mr. Ickes?

A. It is.

Mr. Heron: I hand the Notary this Bulletin No. 51, which I offer in evidence and ask the Notary to mark it Plaintiff's Exhibit #1, Madigan.

Q. Can you furnish us with a photostatic copy of the cover page of the original Bulletin No. 51, showing Mr. Ickes' signature?

A. I can.

Mr. Heron: I offer in evidence this photostatic copy of the cover page of the original Bulletin No. 51, and ask the Notary to mark it Plaintiff's Exhibit #2, Madigan, and attach it to the deposition.

Q. Do you know whether or not this Bulletin No. 51, Revised October 1, 1935, was promulgated generally among the executive department of the Government?

A. It was in connection with Federal projects.

Q. Can you tell me whether or not the building of the library building at Howard University was a Federal project or a non-Federal project?

Objection by Mr. Edrington: I object to that question, because it is purely a question of law for the Court to decide and not for the witness.

A. From my point of view this was a project known as a Federal project as contrasted with the non-Federal projects.

Q. Do I understand that the activity of the Public Works Administration was divided generally into Federal and non-Federal projects?

A. That is right.

Mr. Heron: That is all.

Cross-examination.

By Mr. Edrington:

Q. Do you feel this library building at Howard University was considered by the Bureau as a Federal project?

A. Yes, Sir.

[fol. 151] Q. Did you know that the United States did not own the land on which that library building was built?

A. No.

Q. You didn't know that Howard University is a private corporation?

A. What concern has that to do with my answer?

Q. You made a statement that the Howard University library building was a Federal project and I want to know how you arrive at your opinion?

A. I tried to make it plain that I was expressing my personal official opinion whether it was one of the two kinds of projects Public Works Administration deals with, namely Federal or non-Federal. It is in the Federal class as contrasted with non-Federal projects.

Q. Who put it in that group?

A. The Administrator would have put it in whatever category it was in.

Q. Because the Administrator put it in that class is your reason for saying it is a Federal project. The allotment was presumably for public works of the United States.

A. I do not have all the information necessary to answer the questions you are propounding. It was questions around the bulletin that I expected to answer, if other questions are to be asked it is necessary for me to know and get the proper records.

Q. In your opinion this is a public work, Federal project class?

Objection by Mr. Heron: I object on the ground that witness has answered the question by stating classification was made by the Administrator.

Q. That is your only reason for stating it is a public work of the United States, because Mr. Ickes placed it in that category?

Objection by Mr. Heron: I object. Witness did not say it was a public work of the United States, but a Federal project.

Q. I correct my question. Your only reason for saying it is a Federal project is because Mr. Ickes as Administrator of Public Works placed it in that category?

A. We have two types of projects under the Public Works Administration, non-Federal and Federal, and I know the project to which you refer is not one of those included in any of our non-Federal lists.

[fol. 152] Q. Non-Federal projects—What types of projects are they?

A. All types of projects—buildings of various kinds, sewers etc.

Q. It includes school houses, court houses etc. in municipalities, cities or states?

A. Yes.

Q. Is it not a fact that Bulletin No. 51 is attached to some or all non-Federal project contracts?

Objection by Mr. Heron: I object to this question on the ground that Bulletin No. 51 is self-explanatory.

A. As proper.

Q. Do you know anything about the appropriation or allotment for this library at Howard University?

A. I do not know.

Q. Do you know anything about an appropriation by Congress to build that building?

A. I do not know about that.

Q. You do not know where the funds came from for the building of that library building?

A. I do not.

By Mr. Edrington: That is all.

Re-direct examination.

By Mr. Heron:

Q. Is my understanding correct that non-Federal projects are those where contracts are let by a party other than the United States, and Federal projects are those let by the United States direct? If you are not satisfied to answer simply say so.

A. The non-Federal projects, as I have heretofore stated, are those projects under which the Public Works Administration enters into a contract with public bodies for the construction of projects of various types. The Federal

projects as we refer to them in contrast to those non-Federal projects, are the projects resulting from the allocation of funds to Federal Departments and agencies.

Q. When you speak of a contract between the United States and a public body constituting non-Federal projects, do I understand that you mean by that a loan contract to the municipality?

A. It may be a loan, or loan and grant, or grant only.

By Mr. Heron: That is all.

[fol. 153] Recross-examination.

By Mr. Edrington:

Q. Are there any instances when the Federal Emergency Administrator of Public Works has entered into contracts of a semi-public nature where the funds were appropriated or allocated by the Administrator and the contract signed by him or by a subordinate in his office?

A. I do not know of any.

By Mr. Edrington: That is all.

There being no further interrogatories propounded the witness was dismissed.

John J. Madigan. Signature of Witness.

Subscribed and sworn to before me this 2nd day of May, 1940, Christabel E. Hill, Notary Public, D. C. (Notarial Seal.)

Filed May 2, 1940. Charles E. Stewart, Clerk.

Plaintiff's Exhibit #2, Madigan

Federal Emergency Administration of Public Works

Harold L. Ickes, Administrator

Washington

231
Aspoas
Seward
Clark
Kades
Ickes

Bulletin No. 51

Information relating to the negotiation and administration of contracts for federal projects under Title II of the National Industrial Recovery Act

Part I. Instructions to Contracting Officers

Part II. Instructions to Bidders and Contractors

Revised October 1, 1935

These instructions supersede any instructions previously issued under authority of the administrator which may conflict herewith.

United States Government Printing Office

Washington: 1935

C. E. Hill, Notary Public, D. C. (Notarial Seal.)

[fol. 154] Thereupon DR. MORDECAI W. JOHNSON was called as a witness for and on behalf of the defendants, duly sworn by the Notary Public, and then examined and testified as follows:

Direct examination.

By Mr. Edrington:

Q. Dr. Johnson, what is your business and occupation?

A. President of Howard University, education.

Q. Is the Howard University of which you are President the same Howard University situated in the City of Washington for which a library building was constructed by Irwin & Leighton as general contractors?

A. It is.

Q. How long have you been President of Howard University?

A. Since July 1st, 1926, formally; actually since September 1st, 1926.

Q. Prior to the time that you became President were you associated with the University in any capacity?

A. No, except occasionally as a lecturer.

Q. And you have continuously served as President from 1926 to date?

A. Yes, sir.

Q. A period of some fourteen years?

A. Yes, sir.

Q. Is Howard University the same University referred to in an Act of Congress approved March the 2nd, 1867, of which Act is here produced a copy, certified by the Archivist of the United States as a true copy? Will you look at that and see if that relates to the same Howard University of which you are the President at this time?

A. Yes, sir.

Q. And that is the Act that incorporated Howard University?

A. It is.

Mr. Edrington: In connection with the witness' testimony I offer in evidence the duly certified copy of Act of Congress, Public Act No. 77, approved March 2, 1867, as certified by the Archivist of the United States, as Defendants' Exhibit Johnson 1.

(The document so produced and identified is filed herewith, marked Defendants' Exhibit Johnson 1.)

Q. Dr. Johnson, I show you what purports to be a copy of an Act for the relief of Howard University, approved June 16, 1882, duly certified, and ask you if you know [fol. 155] whether or not, according to the records of your office, this is an Act relative to the Howard University of which you are President.

A. I know of this Act.

Q. What is that, sir?

A. I know of this Act.

Q. That applies to your University, does it not?

A. Yes, sir.

Q. Howard University?

A. Yes, sir.

Mr. Edrington: In connection with the witness' testimony I offer in evidence the duly certified copy of an Act for the relief of Howard University, approved June 16, 1882, Public No. 118, and ask that it be marked Defendants' Exhibit Johnson 2.

(The document so produced and identified is filed herewith, marked Defendants' Exhibit Johnson 2.)

Q. I show you a copy of a third Act of Congress, amending Section 8 of the original Act of Incorporation of 1867, and ask you whether or not you are familiar with that Act,

of December 13, 1928 and whether that also applies to Howard University.

A. Yes.

Mr. Edrington: I offer this document in evidence and ask that it be marked Defendants' Exhibit Johnson 3.

(The document so produced and identified is filed herewith, marked Defendants' Exhibit Johnson 3.)

Q. Dr. Johnson, I understand that your University has published a small booklet, which has in it not only the Acts of Incorporation, the amendments, and so forth, but also your By-laws.

I show you such a document and ask you whether that is published by your University and whether you know it to be accurate.

A. Yes. This is an accurate publication of the Act of Incorporation as amended to May 13, 1938, and By-Laws of the Board of Trustees of Howard University, revised April 14, 1936.

Mr. Edrington: In connection with the witness' testimony I offer this booklet and ask that it be marked Defendants' Exhibit Johnson 4.

(The document so produced and identified is filed herewith, marked Defendants' Exhibit Johnson 4.)

[fol. 156] By Mr. Heron:

Q. Dr. Johnson, could you tell me whether or not this little pamphlet, which has just been described, contains a verbatim copy of the Articles of Incorporation?

A. It is so understood to be, yes.

Q. And it is complete, is it, up to April 14, 1936?

A. Yes.

Q. Have there been other changes since that time?

A. Not fundamental and structural changes.

Q. But some additional changes?

A. Yes.

Mr. Jackson: We object to the admissibility of that document.

By Mr. Edrington:

Q. Dr. Johnson, how many students are enrolled in the University or how many were enrolled at the time that the

library building was being constructed—this library building?

A. Better let me get some documents?

Q. Oh, we do not want to know exactly. Give the number to us roughly.

A. About twenty-three hundred.

Q. About twenty-three hundred?

A. Yes.

Q. Are those day students as well as boarding students?

A. Yes. Some are day students.

Q. Some are day students and some are boarding students?

A. Yes.

Q. What tuition do these students pay?

A. From $125 to $250 each, amounting in all to a sum ranging from $225,000 to $240,000 a year.

Q. A year?

A. Yes.

Q. Some of that includes their board as well as their tuition?

A. No. That is the tuition solely.

Q. Do they pay an additional amount for board?

A. Yes, those who board here.

Q. Does that go to the University?

A. Yes. The boarding and rooming facilities are supposed to be self sustaining and they are barely such, both sides of the ledger balance.

Q. In other words, no attempt is made to make a profit out of the boarding of the students.

A. That is right.

[fol. 157] Q. If it is carried on at cost you are satisfied?

A. Yes, sir.

Q. From what sources does Howard University obtain sufficient funds to operate, aside from the revenues coming from tuition, room, and board?

A. Well, we have a small endowment, approximately a million dollars.

Q. Where did that endowment come from originally?

A. Oh, from many sources, gifts from many sources, gifts of property and funds; and a half a million dollars of it was raised in connection with the School of Medicine; $250,000 from the General Board of Education in New York and $250,000 coming from colored people and various friends. That was raised about thirteen or fourteen years ago.

Then we have current gifts from time to time, from individuals and from foundations.

Q. Will you name some of the foundations, the big ones, that you get aid from?

A. The Julius Rosenwald Fund, the General Education Board, the Rockefeller Foundation, the Carnegie Corporation, and—those are the largest ones.

Q. Will you kindly state, if you can, what the total budget of the University is in a normal year?

A. It runs around $1,100,000 a year.

Q. That is to pay the upkeep of the University, to pay the salaries of the teachers and professors?

A. That is right. It takes care of administration, instruction, operation, and maintenance of the plant, including the boarding department; also, accessory functions of the University.

Q. You also obtain from the Federal Government certain funds, do you not?

A. We do.

Q. Will you kindly state the amounts of those contributions for the years 1935, 1936, and 1937, if you can?

A. It would be approximately $675,000.

Q. From the Federal Government?

A. Yes.

Q. And the difference is made up from these other funds that you have just spoken of?

A. From student fees and these other funds.

Q. Do you know of your own knowledge who is the owner of the real estate that forms the campus here?

A. Oh, yes.

Q. Who is?

A. Howard University, the trustees of Howard University.

Q. Howard University?

A. Yes.

[fol. 158] Q. The title is not in the Government?

A. No, sir.

Mr. Jackson: We object to that and move to strike it out.

By Mr. Edrington:

Q. I show you a plot plan forming part of the contract drawings in connection with the contract for constructing the Howard University Library Building and ask you

whether it bears your signature anywhere and whether you can tell me whether that is a part of the contract drawings.

A. It does not bear my signature; but it has the official signature of Jesse E. Moorland, who was Chairman of the Executive Committee, and the signature of Emmett J. Scott, Secretary.

Q. Would you say that that is a true copy of the contract drawings authenticated by those signatures?

A. I would.

Q. In the lettering in the lower right hand corner it is described as Plot Plan, Library, Howard University, Washington, D. C., Albert I. Cassell, Architect, Washington, D. C., Francis R. Weller, Inc., Consulting Engineers, Washington, D. C.

A. Yes, sir.

Q. That is part of the plans. You have seen this before, haven't you?

A. Exactly, yes, sir.

Q. Now, it shows the location on the University campus of the new library building.

A. Now, let me see. Yes; it does.

Q. Is that building situated on the campus of Howard University?

A. It is.

Q. And on grounds owned by Howard University?

A. It is.

Q. As shown on that drawing?

A. Yes.

Mr. Edrington: In connection with the witness' testimony I would like to offer in evidence this drawing, which is a part of the contract drawings. I got it from the contract drawings file.

I ask that it be marked Defendants' Exhibit Johnson 5.

(The document so produced and identified is filed herewith, marked Defendants' Exhibit Johnson 5.)

Q. What streets would you say bound this area in which the library building is situated?

[fol. 159] A. The library building is situated on a plot of ground bounded on the north by Howard Place, roughly; on the east by 4th Street, Northwest; on the west by 6th Street, Northwest; and on the south by College Street, Northwest. However, there are several other buildings in that same plot.

Q. Yes. That is a large plot, of several squares of ground, isn't it?

A. That is right.

Q. How long has that plot which you have just described, bounded as you have described, been owned by Howard University, if you know?

A. I would say since its beginning, around seventy years now.

Mr. Jackson: I object to the answer and move to strike it out.

The Witness: This is, as the Treasurer says, a part of the original plot.

By Mr. Edrington:

Q. Until recently—I understand until yesterday, the Interior Department had some supervisory control over Howard University. Is that correct?

A. It continues to have.

Q. It continues to have?

A. Yes.

Q. Even under this transfer?

A. It will until the 10th of the month.

Q. It will until the 10th of June?

A. Yes.

Q. Of what does that control consist, Dr. Johnson? Can you describe it?

A. Well, it is pretty exactly described in this last piece of legislation that has been given to me. I can comment on that.

Q. You mean this one, the Defendants' Exhibit Johnson 3?

A. That is right.

(After examining the exhibit.) No; it does not say it here; but all moneys appropriated to the University by the United States Government are expended under the supervision of the Secretary of the Interior; and to that extent he exercises continuous supervision over the University.

Q. Doctor, has the University ever passed a resolution of its Board of Trustees consenting to the transfer of any of it- property to the Federal Government?

A. Yes.

Q. I mean the present property, owned now, any of the present property?

A. Oh, no; no.

[fol. 160] The property that was transferred to the Federal Government was the property included in that second piece of legislation that you showed there, property transferred to the Federal Government for a park, part of which is now occupied by Freedmen's Hospital.

Q. For which you received money? It was a transfer for which you received certain moneys?

A. The Government gives us a dollar a year.

Q. But I am speaking of the land on which the library building is situated.

A. No.

Q. Has any resolution ever been passed by the Board of Trustees of Howard University consenting to the transfer to the Federal Government of the property on which this library building is situated? Did you ever consent to the transfer of that property to the Federal Government?

A. Not to my knowledge.

Q. Not in the fourteen years in which you have been President, anyway?

A. No, indeed.

Mr. Edrington: I think that is all I care to ask the doctor.

Cross-examination.

By Mr. Heron:

Q. Dr. Johnson, you mentioned annual contributions for 1935, 1936, and 1937 as being approximately $600,000; and I take it you meant annually?

A. Yes. I will be glad to give you the exact sum. I can have reference to documents; but it would approximate that amount annually.

Q. And those appropriations, I take it, were for salaries and the general expenses of the University?

A. Salaries, general expenses, repairs, renewals, and so forth. They come under those two items. Those are the two items under which they are appropriated—salaries and general expenses.

Q. And any appropriation such as the one for the building of this library building would be in addition to that, would it not?

A. Yes.

Q. And do you recall what such additional appropriations for construction were made in 1935?

A. I could not tell you that without reference to documents; but I will be glad to do that.

Q. Well, let me see if I can refresh your recollection as to 1936. Do you recall the appropriation of $525,000 for [fol. 161] the construction of two units of men's dormitories?

A. That is right. That was in October of 1935, though.

Q. In 1935?

A. Yes.

Q. Was it actually expended in 1936?

A. It is about to be concluded in this year's expenditures. It is still being expended.

Q. And about the same time was there an appropriation of $242,000 for supplemental allotments to the library building?

A. Yes.

Q. And then in 1937 was there an additional appropriation of $320,811, also for supplemental allotments for the library building?

A. Well now, you are getting a little tangled up there. The actual total of supplemental appropriations for the library amounted to a little over $300,000.

You see, the original appropriation by the Federal Government, by the Congress of the United States was $400,000, with an authorization for a contract for $800,000; and then there was an authorization—there was an additional appropriation by the Public Works Administration of a total of approximately $305,000.

(After examining an annual report of the University)

On October 4, 1935 was the first appropriation of $525,000 for the men's dormitories.

The Act of Congress authorizing the library was February 14, 1931.

Q. Now, I wonder if you can explain the other two items which came along in addition?

A. Mr. Johnston has sent for a document.

Q. Well, while we are waiting, can you tell me whether or not this $525,000 represents an actual appropriation by Congress or a P. W. A. allotment?

A. A P. W. A. allotment.

Q. A P. W. A. allotment?

A. Yes.

Q. I wanted to ask you about the endowment fund. Is the corpus of that available to the University or is the income only available for expenditure?

A. While the corpus of most of the endowments is in our possession we are permitted to expend only the income of the endowments.

Q. Can you tell me whether or not it is the custom in most of the state universities to charge tuition to the students?

A. It is.

[fol. 162] Q. It is?

A. It is.

Mr. Heron: I think that is all I have, outside of the questions about these appropriations.

Mr. Edrington: I think the Treasurer can better give the information on that.

Any other questions, gentlemen?

Are you through with the doctor?

Mr. Heron: Yes; I am.

Mr. Edrington: Any further questions, gentlemen?

By Mr. Heron:

Q. Doctor, you spoke of an appropriation approved February 14, 1931, which I find appears at 46 Stat. 115, an Act making appropriations for the Department of the Interior for the fiscal year ending June 30, 1932, and for other purposes; and under Howard University I find there an appropriation for general library building, not to exceed $800,000, of which $400,000 was made immediately available. Was that the Act you spoke of, as appropriating $400,000?

A. That is it.

Q. Were any of those funds used for the building of the library building?

A. Those funds were impounded when President Roosevelt was elected. Shortly after he was elected all appropriations for buildings were impounded.

After the Public Works Administration was set up, they were released and the building went forward.

Now, whether you would technically construe that as the same money or not I do not know; but it certainly followed under the same appropriation.

Q. But that was the specific appropriation by Congress for the construction of this building?

A. That is right.

Q. And you all had worked a long time to get that through?

A. That is right.

By Mr. Jackson:

Q. The $400,000 to which Mr. Edrington just referred——

Mr. Edrington (Interposing): The authorization for $800,000.

By Mr. Jackson:

Q. (Continued:) The authorization was $800,000 and moneys were appropriated by Congress under the Act referred to?

A. That is right.

[fol. 163] Q. Of which $400,000 was to be made immediately available?

A. That is right.

Q. But before construction had begun or any of the contracts had been let the funds were impounded?

A. With one exception. We had actually expended moneys under that appropriation for the plans and specifications to be drawn. All unexpended balances were impounded.

Q. Well, do you know what the amount of the total contract for this library building was?

The Witness: Mr. Johnston, you have that there, don't you?

A. It was $1,105,000, roughly speaking. The actual total of the appropriation was $1,120,811.58.

Q. What did that include, if anything, other than the building itself?

A. Equipment, furnishings.

Q. No books?

A. No, no books.

Q. The funds from which the construction of the library building was completed were funds which were allotted by the Public Works Administrator, were they not?

A. Well, that would be a matter of technical interpretation, for which you would have to go to the Government itself. I would say yes; but that would be based on my knowledge.

Q. You understood them to be P. W. A. funds?

A. Exactly. Every dollar that we have expended to a contractor on this building, other than the architect himself, came through the Public Works Administration; but some of the funds were expended to the architect prior to the coming into existence of the Public Works Administration.

Q. Well now, those funds expended prior to the funds which you received from the Public Works Administrator were likewise funds which the Federal Government made available?

A. Yes.

Q. There were no funds expended on this building derived from tuition fees from students?

A. No, not on the construction and equipment of this building.

Q. And was any part of the income from the endowment fund used in the construction of this building?

A. No.

Q. And all funds used in the construction of this building were funds which came from the Federal Government?

A. Yes.

Q. And you understood them to be funds which came—which were described as P. W. A. funds?

A. Yes.

[fol. 164] Q. And all of them came from the Public Works Administration?

A. Yes, with the exception which I have indicated.

Q. With the exception which you have indicated?

A. Yes.

Q. Dr. Johnson, who exercised the control over the expenditure of the funds for the construction of this building?

A. The Secretary of the Interior.

Q. As Public Works Administrator?

A. Yes, in a double capacity.

By Mr. Edrington:

Q. What do you mean by "a double capacity"?

A. That is he was at the same time the Secretary of the Interior and the administrator of public works.

Q. You mean to say that he controlled them as administrator of public works and also as Secretary of the Interior?

A. Yes.

Q. By virtue of the statute which gave him the right to supervise the expenditure of all funds donated by the Federal Government to Howard University?

A. That is right.

By Mr. Jackson:

Q. What I am getting at is that you, as President of Howard University, did not directly control the expenditure of these funds?

A. No.

Nevertheless, you understand, there is quite a—that "no" is not wholly literal. That is to say, Howard University had plans and specifications drawn to suit its own educational needs; and it had complete say so up to the point when those plans and specifications were presented for the approval of the Secretary of the Interior. When he approved the plans and specifications he approved the will of the University; so that from that point on he was supervising the expenditure of the Government funds which were used in the construction of the library building.

I wanted to make that clear.

Q. Without his approval nothing could have been done?

A. That is right.

Q. They could not have been expended as appropriated?

A. That is right.

[fol. 165] Mr. Edrington: Any other questions, gentlemen? Thank you, Doctor.

(Signature of the witness was waived by stipulation of counsel for the parties.)

Thereupon VIRGINIUS D. JOHNSTON was called as a witness for and on behalf of the defendants, duly sworn by the Notary Public, and then examined and testified as follows:

Direct examination.

By Mr. Edrington:

Q. Mr. Johnston, you are the Treasurer of Howard University?

A. Yes.

Q. You hold that office by virtue of what authority?

A. Of the Board of Trustees, which annually elects a Treasurer.

Q. And you were elected the Treasurer?

A. Yes.

Q. How long have you served as Treasurer?

A. Since January 1st, 1932.

Q. And continuously since 1932 you have been Treasurer of Howard University?

A. Yes.

Q. You have produced here today a document dated May 7, 1940, addressed to Mr. James M. Nabrit, Jr., Secretary, Howard University, which gives certain figures.

Will you kindly tell us what those figures are and what they represent?

A. Those figures represent the appropriations for the construction of buildings under the Public Works appropriations since 1933.

Q. Since 1933?

A. Yes.

Q. Have there been any appropriations by the Congress direct for the aid of Howard University in construction work since 1933?

A. No.

Q. There have not?

A. No.

Q. Was the appropriation by the Act of 1931 for the library building the last one that you know of, or were there any between 1931 and 1933?

A. Probably the last one was the appropriation for the power plant.

Q. The appropriation for the power plant?

A. Yes.

Q. That was constructed before the P. W. A.?

A. That was the last one being considered. I am sure [fol. 166] that that was the last appropriation by Congress for Howard University for construction.

Q. For construction work?

A. Yes.

Q. But since then you have had other appropriations for the maintenance and assistance in operating the University, from Congress, each year?

A. Yes.

Q. Under the Interior Department appropriation bill?

A. That is right.

Q. Do you mind my having this paper and offering it in evidence?

A. Suppose we make a copy of it.

Mr. Edrington: Is that agreeable to you, gentlemen, his making a copy of this? He says this is an office copy.

If there is no objection, I offer this in evidence as Defendants' Exhibit Johnston 1.

(The document so produced and identified is filed herewith, marked Defendants' Exhibit Johnston 1.)

Q. Is the library building included in that?

A. Yes.

Q. It is?

A. Yes.

Q. I notice that the library building is $1,120,811.58.

The contract for the building was some $800,000, was it not, in round figures, approximately eight hundred and some odd thousand dollars?

A. I am not sure I could give you that.

Q. Just in round figures. I think that is what it was, approximately.

The contract has been produced, a photostatic copy of the contract has been produced, which shows that $817,225 was the original contract price. That is right, isn't it?

A. That is right.

Q. Then what other furniture or fixtures were supplied that made up the million dollars or over a million dollars that is shown on that letter of yours to which we have just referred?

A. There were extras to this contract, of course. Then there was a contract for the furniture. I think Wanamaker has that.

Q. And stacks?

A. And a contract for stacks, yes, for the new building. Those were the three major contracts.

The other was for architectural fees, engineers' fees—and I don't know what else.

[fol. 167] Q. You did not have to acquire a site, because Howard University owned that, didn't it?

A. That is right.

Mr. Edrington: You may proceed with cross examination, gentlemen.

Cross-examination.

By Mr. Heron:

Q. Did I understand that the various amounts which were listed in Defendants' Exhibit Johnston 1, which is the Nabrit letter, constitute the allotments from the Public Works Administration?

A. That is true. I do not believe that any of the previous expenditures are included in that.

Q. Have there been any buildings erected at the University since 1933 from funds other than those allotted by the Public Works Administration?

A. No.

Q. Can you tell me when the last building was erected at the University from funds other than those contributed by the Federal Government?

Mr. Edrington: You mean by the P. W. A.?

Mr. Heron: No. I mean by the Federal Government.

Mr. Edrington: By the Federal Government.

A. I have no way of knowing at this time.

The first building that was constructed by the Federal Government was the Thirkield Science Hall. I think that was in 1909.

Since that time there was a Carnegie Library. The Carnegie building was in 1911.

By Mr. Sebald:

Q. These buildings that you mentioned were built from Federal funds?

A. No, private funds.

The Thirkield Science Hall was built from a Federal appropriation, a congressional appropriation, in 1909. That was the first one constructed by the Federal Government.

Q. The second building which you mentioned?

A. No. The second building I mentioned was the Carnegie building. The Carnegie Library was a gift from Mr. Andrew Carnegie. I think that was about 1911.

[fol. 168] By Mr. Heron:

Q. Do you know the amount of that gift?

A. Hold that question just a minute.

The Carnegie Library was erected in 1910. It was erected from funds contributed by Andrew Carnegie. Somewhere I have seen that the building cost $85,000 but I am not sure about that.

Q. Now, do you recall any other buildings which have been erected at Howard University since 1910 and which were built with funds other than Federal funds?

A. I do not know of any such buildings.

Mr. Heron: I have no further questions.

Redirect examination.

By Mr. Edrington:

Q. Prior to 1909, the first Federal appropriations, all the buildings at Howard University had been built by the University with its own funds?

A. Yes.

Q. That is correct, is it?

A. That is right, sir.

There is one correction. There was a Medical School building, which was constructed in 1926 and 1927. It was built in part with private funds. The Medical School building cost a total of $130,000, of which $105,000 was private funds.

By Mr. Heron:

Q. Do I understand that the $105,000 which came from private funds was used for the purchase of the equipment of the building?

A. Yes, but it was part of the original cost and the Government appropriation was conditioned upon that.

By Mr. Edrington:

Q. Then, as I gather it, Mr. Johnston, Howard University buildings have been acquired by Howard University from both private funds and the generosity of the Federal Government?

A. That is right.

Mr. Edrington: I think that is all, gentlemen.

(By agreement of all counsel appearing the reading and signature of the foregoing depositions by the witnesses were waived.)

[fol. 169] DEFTS.' EXHIBIT JOHNSTON 1-A

Howard University: Treasurer's Office: File Copy

May 7, 1940

Mr. James M. Nabrit, Jr., Secretary, Howard University.

DEAR MR. NABRIT:

In accordance with telephone request from Miss Williams yesterday, there is below statement of appropriations from the federal government for the years 1933 to 1939:

No.	Project	Symbol	Amount
32)			
34)	Chemistry Building	4-03/7640.7	$ 626,300.00
35	Classroom Building	4-03/7640.7	461,200.00
36	Library Building	4-03/7640.7	1,120,811.58
33	Power Plant Building	4-03/7640.7	555,577.00
37	Science Building	4-05678.7	500.00
1-32	Reconditioning and Repairs	4-03/7640.7	92,811.00
39	Dormitory Building	4-05/1678.7	646,200.00
	Total		$3,503,399.58

Very truly yours, VDJ, *Treasurer.*

mdw

Paul J. Robertson (Seal). *Notary Public in and for the District of Columbia.* My Commission expires May 1, 1942.

[fol. 170] ACT OF INCORPORATION

(As Amended to May 13, 1938)

and By-Laws of the Board of Trustees

of Howard University of the District of Columbia

(Revised April 14, 1936)

Act of Incorporation

of the Howard University of the District of Columbia.

Chapter I.—Act of Incorporation

An Act to incorporate "The Howard University," in the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled.

Section 1. That there be established, and is hereby established, in the District of Columbia, a University for the education of youth in the liberal arts and sciences, under the name, style, and title of "The Howard University."

Section 2. And be it further enacted, That Samuel C. Pomeroy, Charles B. Boynton, Oliver O. Howard, Burton C. Cook, Charles H. Howard, James B. Hutchinson, Henry A. Brewster, Benjamin F. Morris, Danforth B. Nichols, William G. Finney, Roswell H. Stephens, E. M. Cushman, Hiram Barber, E. W. Robinson, W. F. Bascom, J. B. Johnson, and Silas L. Loomis be, and they are hereby declared to be a body politic and corporate, with perpetual succession in deed or in law to all intents and purposes whatsoever, by the name, style and title of "The Howard University;" by which name and title they and their successors shall be competent, at law and in equity, to take to themselves and their successors, for the use of said University, any estate whatsoever in any messuage, land, tenements, hereditaments, goods, chattels, notes, bonds, stocks, moneys and other effects, by gift, devise, grant, donation, bargain, sale, conveyance, assurance or will; and the same to grant, bargain, sell, transfer, assign, convey, assure, demise, declare to use and farm let, and to place out on interest, for the use of said University, in such manner as to them, or a majority [fol. 171] of them, shall be deemed most beneficial to said institution; and to receive the same, their rents, issues and profits, income, dividends and interests, and to apply the same for the proper use and benefit of said University; and by the same name to sue and be sued, to implead and be impleaded, in any courts of law and equity, in all manner of suits, actions, and proceedings whatsoever, and generally by and in the same name to do and transact all and every the business touching or concerning the premises.

(Amended and approved, May 13, 1938.)

Section 3. And be it further enacted, That the first meeting of said corporation shall be holden at the time and place at which a majority of the persons herein above named shall assemble for that purpose; and six days' notice shall be given each of said corporators, at which

meeting said corporators may enact By-Laws, not inconsistent with the laws of the United States, regulating the government of the corporation.

Section 4. And be it further enacted, That the government of the University shall be vested in a Board of Trustees of not less than thirteen members, who shall be elected by the corporators at their first meeting. Said Board of Trustees shall have perpetual succession in deed or in law, and in them shall be vested the power hereinbefore granted to the corporation. They shall adopt a common seal, which they may alter at pleasure, under and by which all deeds, diplomas, and acts of the University shall pass and be authenticated. They shall elect a president, a secretary and a treasurer. The treasurer shall give such bonds as the Board of Trustees may direct. The said Board shall also appoint the professors and tutors, prescribing the number and determining the amount of their respective salaries. They shall also appoint such other officers, agents, or employees, as the wants of the University may from time to time demand, in all cases fixing their compensation. All meetings of said Board may be called in such manner as the Trustees shall prescribe; and nine of them so assembled shall constitute a quorum to do business, and a less number may adjourn from time to time.

Section 5. And be it further enacted, That the University shall consist of the following departments, and such others [fol. 172] as the Board of Trustees may establish—first, normal; second, collegiate; third, theological; fourth, law; fifth, medicine; sixth, agriculture.

Section 6. And be it further enacted, That the immediate government of the several departments, subject to the control of the Trustees, shall be entrusted to their respective facilities, but the Trustees shall regulate the course of instruction, prescribe, with the advice of the professors, the necessary text books, confer such degrees, and grant such diplomas, as are usually conferred and granted in other universities.

Section 7. And be it further enacted, That the Board of Trustees shall have the power to remove any professor or tutor, or other officers connected with the institution, when, in their judgment, the interests of the University shall require it.

Section 8. And be it further enacted, That the Board of Trustees shall publish an annual report, making an exhibit of the affairs of the University.

Section 9. And be it further enacted, That no misnomer of the said corporation shall defeat or annul any donation, gift, grant, devise, or bequest, to or from the said corporation.

Section 10. And be it further enacted, That the said corporation shall not employ its funds or income, or any part thereof, in banking operations or for any purpose or object other than those expressed in the first section of this act; and that nothing in this act contained shall be so construed as to prevent Congress from altering, amending, or repealing the same.

Approved March 2, 1867. (14 Stat. L., 438.)

By the Act of June 16, 1882 (22 Stat. L., 104), the Trustees conveyed to the United States a square of ground bounded by Pomeroy, Four-and-a-half, College, and Sixth Streets, containing eleven acres to be used as a public park under the superintendence of the United States in consideration of which all taxes and penalties then due the District of Columbia were remitted, and the property of the University, so long as used for the purposes set forth in its charter, exempted from taxation.

By resolution of both Houses of Congress August 28, 1890 (26 Stat. L. 678), the Librarian of Congress, and of the [fol. 173] Senate and House of Representatives, and the Librarian of the Department of Justice were authorized and directed to deliver to the University as a gift for the law department one copy of such duplicate law books as were in the respective libraries.

Revision of Charter as adopted by Legislation of the Board of Trustees and Legislation of the Congress of the United States.

Amendment to Section 8, Act of Incorporation Howard University.

Act of Congress—Approved December 13, 1928 (45 Stat. 1021).

Section 8. Annual appropriations are hereby authorized to aid in the construction, development, improvement, and

maintenance of the University, no part of which shall be used for religious instruction. The University shall at all times be open to inspection by the Bureau of Education and shall be inspected by the said bureau at least once each year. An annual report making a full exhibit of the affairs of the University shall be presented to Congress each year in the report of the Bureau of Education.

Endorsed: Filed Jun 18 1940. Charles E. Stewart, Clerk.

Endorsed: United States Court of Appeals for the District of Columbia Filed Nov 15 1940 Joseph W. Stewart Clerk

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IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, OCTOBER TERM, 1940

No. 7784

ALEXANDER D. IRWIN and ARCHIBALD O. LEIGHTON, trading as Irwing & Leighton, and United States Guaranty Company, a corporation, *Appellants*

vs.

UNITED STATES OF AMERICA, to the use of Noland Company, Incorporated, a corporation, *Appellee*

STIPULATION OF COUNSEL FOR APPELLANTS AND APPELLEE AS TO PRINTING

It is agreed and stipulated by the parties hereto, through their undersigned counsel, that the record filed in this Court will be printed as filed, omitting only the following:

[fol. 174] 1. Omit record p. 19, except the printing of notation as follows:

"Plaintiff's Exhibit Noland #1, filed October 29, 1940."

2. Omit page 20.
3. Omit page 22 to 23, (inclusive).
4. Omit first 21 lines page 24.
5. Omit last 5 lines page 24.
6. Omit last 5 lines page 26.
7. Omit first 5 lines page 27.
8. Omit last 30 lines page 27.
9. Omit first 20 lines page 28.

10. Omit all pages 29-30.
11. Omit line 5 to bottom of page 33.
12. Omit page 34, except the notation "Pltf. exhibit Noland 2, filed Oct. 29, 1940."
13. Omit pages 37, 38 and 39.
14. Omit page 40, except lines 1 to 3 (incl.)
15. Omit page 41, except the following:

"Pltf. Exhibit Noland 3, filed Oct. 29, 1940".

16. Omit pages 44-53 (incl.)
17. Omit last 16 lines, page 57.
18. Omit all of page 58 except Sec. 8, last 8 lines.
19. Omit all of page 59 except first two lines.
20. Omit pages 60 to 110 (incl.)
21. Omit paragraphs G1, G2, G4, G5 and G6, p. 111.
22. Omit paragraphs G7, G9, G11 and G13, page 112.
23. Omit pages 113 and 114.
24. Omit first 4 lines and paragraphs G28, G29, G30, G31, G33 to end of page 115.
25. Omit all of pages 116 and 117.
26. Omit first 19 lines of page 118.
27. Omit G54, page 119 to bottom of page 119.
28. Omit pages 120 to 265 (incl.).
29. Omit pages 371, 373 and 374.
30. Omit line 7 to end of page 381.
31. Omit page 390.
32. Omit pages 392, 393 and 394.
33. Omit first 13 lines, page 395.
34. Omit page 419.
35. Omit page 421.

[fol. 175] 36. Omit pages 429 to 444, (incl.).

37. Omit first 7 lines of page 445.
38. Appellant will supply 30 lithographed copies of Noland 4 and Noland 5, pages 266 to 370, (incl.).
39. It is agreed and stipulated between counsel for the appellants and appellee, that a copy of the Miller Act, 40 United States Code 270 (a), (b), (c), (d) and (e), Act of August 24, 1935, c, 642, paragraph 1, 49 Stat. 793, appearing in the record, was attached to the bid data and made a part of the original specifications forming a part of the contract between the appellants and the United States.
40. It is further agreed and stipulated that Defendant's Exhibit 1 and Plaintiff's Exhibit 1 attached to the depositions of Dotson and Madigan are identical with Federal

Emergency Administration of Public Works Bulletin No. 51 appearing in the record as a part of appellee's Exhibit No. 3.

Prentice E. Edrington, Attorney for Appellants.
Alexander M. Heron, Attorney for Appellee.

Washington, D. C. November 14, 1940.

[fol. 176] In United States Court of Appeals for the District of Columbia

No. 7784

Alexander D. Irwin and Archibald O. Leighton, Trading as Irwin & Leighton, and United States Guarantee Company, a Corporation, Appellants,

vs.

United States of America to the use of Noland Company, &c.

Minute Entry of Argument and Submission—May 7, 1941

The argument in the above entitled cause was commenced by Mr. Prentice E. Edrington, attorney for appellants, continued by Mr. Alexander M. Heron, attorney for appellee, and concluded by Mr. Amasa M. Holcombe, attorney for appellants.

[fol. 177] In United States Court of Appeals for the District of Columbia

No. 7784

Alexander D. Irwin and Archibald O. Leighton, Trading as Irwin & Leighton, and United States Guarantee Company, A Corporation, Appellants,

v.

United States of America, to the Use of Noland Company, Incorporated, a Corporation, Appellee

Special Appeal from the District Court of the United States for the District of Columbia

(Argued May 7, 1941. Decided July 28, 1941)

Amasa M. Holcombe and *Prentice E. Edrington*, both of Washington, D. C., for appellants.

Bynum E. Hinton and *Alexander M. Heron*, both of Washington, D. C., for appellee.

Before GRONER, C. J., and MILLER and VINSON, JJ.

OPINION

GRONER, C. J.:

In December, 1936, the United States entered into a contract with appellant, Irwin & Leighton, for the construction of a library building at Howard University in the District of Columbia. A performance bond and a payment bond were required in accordance with the Miller Act.[1] The surety on the bonds was the other appellant,

[1] 40 U. S. C. A. 270a:

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000 the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

* * * * * * * *

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a perform-

[fol. 178] United States Guarantee Company. Irwin & Leighton completed the building in accordance with the contract and paid all subcontractors in full. Appellee, Noland Company, Inc., however, had furnished materials on the order of a subcontractor, for which it was not paid. Accordingly, it brought this action on the payment bond in the name of the United States. The general contractor and the surety moved to dismiss on the ground that the university building was not a "public building or public work of the United States" within the meaning of the Miller Act, under which the suit was brought. The trial court was of the opinion that it was the intention of Con-

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ance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

§ 270b:

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him; *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractural relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United

gress to include within the provisions of the Miller Act contracts for work such as the one involved in the suit, and rejected the motion. We granted a special appeal.

The established and admitted facts are as follows: By Act of February 14, 1931,[2] Congress authorized the construction at Howard University of a library building to cost not to exceed $800,000, of which sum $400,000 was made immediately available. A small part of the latter sum was used for architectural fees, but shortly after the first election of President Roosevelt the original appropriation was "impounded" and no steps were taken to erect the library until after the enactment of the National Industrial Recovery Act, at which time the Administrator of Public Works (the Secretary of the Interior), with the approval of the President, allocated sufficient funds for the construction of the building under a section of that Act authorizing a program of public works projects.[3] The plans and specifications were drawn by an architect selected by Howard University, and were approved by the Secretary. The contract was signed by the Assistant Secretary, and the funds were expended under the direction of the Administrator of Public Works.

[fol. 179] The National Industrial Recovery Act contained no requirement for a bond to secure the faithful performance of contracts made pursuant to its provisions. But the Secretary, in preparing the contract and in his instructions to bidders, gave notice that two bonds would be required—one, a "performance bond" and the other, a

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States Marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit.

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[2] 46 Stat. 115.

[3] 48 Stat. 201, 40 U. S. C. A. 402.

"payment bond", both running to the United States 'as required by the Act of Congress approved August 24, 1935" (the Miller Act, *supra*, footnote 1). When the suit in this case was instituted in the United States District Court for the District of Columbia, it was brought in the name of the United States and was expressly based on the provisions of the Miller Act. The main question, then, for decision is whether the bond sued upon was authorized to be demanded of the contractor under the provisions of that Act.

In *Maiatico Construction Co.* v. *United States*, 65 App. D. C. 62, 79 F. 2d 418, *cert. denied*, 296 U. S. 649, we dealt with a state of facts substantially identical with those we have narrated. That case, as this, involved a contract made by the United States for the construction of buildings for Howard University. There, as here, the government had appropriated the necessary funds. We held there that an unpaid materialman could not recover on a contractor's bond executed under the *Heard* Act. We said in the *Maiatico* case that Howard University is a private corporation; that its charter gives it all the rights and powers usually vested in private corporations, including the right to purchase and sell real estate and the right to contract and to sue and to be sued; that its buildings are erected on its own lands; and that its general funds, including a large endowment fund, are under its control and its financial affairs are subject to the supervision of the Secretary of the Interior *only* as to the expenditure of federal moneys appropriated for university purposes. On this state of facts we held that the generosity of the government in providing buildings for the university from time to time did not of itself change Howard University from a private into a public institution. As a private corporation, it was, of course, subject to all mechanic lien statutes of the District of Columbia. Accordingly, we held that a bond taken under the Heard Act, which applies exclusively to the construction of public buildings of the United States, would not sustain the claim of a materialman for supplies furnished to buildings privately owned.[4]

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[4] *United States* v. *Faircloth*, 49 App. D. C. 323, 265 Fed. 963; *United States* v. *Empire State Surety Co.*, 114 App. Div. 755, 100 N. Y. S. 247; *Penn Iron Co.* v. *Trigg*, 106 Va. 557, 56 S. E. 329.

Unless, therefore, a fair construction of the Miller Act, which in 1935 superseded the Heard Act, will justify a different result, as appellee insists it will, it follows that we must reverse the judgment of the court below.

The Heard Act, as has been often said, was passed in recognition of the inability of subcontractors to take liens upon the public property of the United States. Its practical effect was to substitute the required bond in place of the building on which the lien, in the case of non-public property, would attach. In 1935 bills were introduced in Congress for the purpose of enlarging this protection to subcontractors and supplymen in certain definite respects, resulting in the passage of the Miller Act. The purpose of the new Act was to relieve certain procedural troubles found to exist under the old Act and to shorten the period when, [fol. 180] under that Act, suit might be instituted against the surety. To this end, the Miller Act provides a separate and direct right of action upon a bond called a payment bond, to be taken exclusively for the protection of laborers and materialmen, whereas the Heard Act required only one bond, primarily for the protection of the United States and secondarily for the protection of laborers and materialmen. The reasons and purpose of the change were stated by Congressman Dockweiler (H. R. 5054) as follows:

> The Heard Act as it stands today permits very substantial injustices to be done to laborers, materialmen, and subcontractors. There is only one bond written under that act, and it enures, respectively, to the benefit of the Government on the faithful performance of the contract, and to the benefit of the laborers and materialmen and subcontractors: But the right of the laborers, materialmen, and subcontractors is postponed to an unreasonable length of time. Action under it by the Federal Government must be awaited, on the faithful-performance bond, which action can be brought at any time within 6 months after the full and final completion of the contract; and only after the end of that time can laborers, subcontractors, and materialmen have any relief under the bond.
>
> . . . . . .
>
> All that the materialmen, subcontractors, and laborers desire is a separate and direct right of action upon a separate bond.

The Report of the House Judiciary Committee (No. 1263, 74th Cong. 1st Sess.) is of precisely the same tenor. All of the hearings and discussion centered around an effort to correct a purely procedural question. Accordingly, we think enough has been said to show that the Miller Act adds nothing over the Heard Act to appellee's rights. If appellee may maintain this action under the provisions of the Miller Act, it could in the same circumstances have maintained it under the provisions of the Heard Act prior to its repeal. In either case, the question would be whether an action could be maintained on a bond taken by the United States to secure the payment of laborers and materialmen in the construction of a building which was not a public building of the United States.

But appellee argues that when, in the passage of the National Industrial Recovery Act, Congress authorized the Administrator to prepare a "program of public works" to include "any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public", it thereby declared such work as is involved in the present contract a "public work of the United States" and brought the instant contract within the provisions of the Act. But we think this does not follow. Assuming, for the purpose at hand, that the building of a library at Howard University involves the extension of a project heretofore carried on with public aid to serve the interests of the general public, it would be going very far to say that, by including it within a "public works" program, Congress meant to change the well established definition of public buildings and works as those terms have been invariably understood in statutes requiring security for the performance of contracts made with the United States. And that Congress had no such thought or intent abundantly appears, we think, in considering the other items included in the "program", [fol. 181] for these embrace loans for the construction or completion of hospitals, the operation of which is partly financed from public funds, and likewise projects "of any character heretofore eligible for loans under subsection (a) of Section 604b of Title 15". That section includes projects of states, municipalities, political subdivisions of states, public agencies of states, public corporations, boards, and commissions, and private corporations engaged in constructing bridges, tunnels, docks, viaducts, water

works, canals, and markets devoted to public use and self-liquidating in character. As the result of this, the United States have loaned money to municipalities to build electric light plants and water works, and the Administrator has supervised the contracts for carrying them out.

The Miller Act requires that bonds be taken only for contracts involving the construction of public buildings or public works *of the United States*. Obviously, it was not intended by Congress to include in that category municipal improvements or toll bridges built by private corporations, both of which are included in the designation "public works". Therefore, to hold, under these circumstances that the use in the National Industrial Recovery Act of the words "public works" was intended as a definition to be applied in all cases and to all statutes (the effect of which would be to transform what had always been considered nongovernmental into governmental) would be, we think, wholly unjustifiable. The fact is that in the case we are considering the Secretary overlooked the fact that Howard University is a private corporation and accordingly required a bond under the Miller Act. And in this respect he was clearly in error. It is obvious, therefore, that the case we have is precisely the case we disposed of in *Maiatico Construction Co.* v. *United States, supra,* and there we said that if the bond was not one of the nature contemplated by the statute, no rights accrued to the furnisher of material for the reason that in such a case the Act did not authorize its execution.

Appellee, however, challenges this conclusion on other grounds than those we have discussed, and insists, *first*, that the express language of the Miller Act authorizes the taking of bonds in contracts other than those involving public works or public buildings; *second*, that whether this is true or not, the action of the Secretary is not subject to judicial review; and, *third*, that the bond taken in the present case is sufficient in its terms to permit recovery as upon a private obligation without respect to the statutes or the authority of the Secretary.

The first contention is based on subsection (c) in the Miller Act (*supra*, footnote 1), which reads:

> Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

Counsels' only comment as to this section is that from its inclusion in the statute "it is apparent that care has been taken in the drafting of the statute to remove any doubt as to the authority of the contracting officer in what might otherwise have been questionable cases". It is not quite clear just what is meant by this statement, but it seems to us that the purpose of subsection (c), which does not appear in the Heard Act, was merely to insure that whatever authority the Secretary had prior to the passage of the Miller [fol. 182] Act to require security of persons dealing with the United States in matters not covered by the precise terms of that Act, was not taken away by anything contained in the Act. Very clearly, subsection (c) does not of itself authorize any bonds to be taken under the Miller Act. Whatever rights it created or preserved, if any, were extraneous to those embraced within the terms of that Act, and yet, as we have pointed out, the Secretary took the bond here in suit under the Miller Act and in the most explicit fashion notified bidders on the work that the contract and bonds were to be executed in accordance with its terms; and that this was understood by appellee is apparent from the fact that the suit is expressly brought under that Act.

And so we have an action on a bond running to the United States and taken without authority of law and on which a third party seeks a recovery against a nonresident surety in a Federal Court in the District of Columbia. For reasons already stated and more fully set forth in the *Maiatico* case, we think the action is not maintainable.

Second. The argument that the action of the Secretary is not subject to judicial review is based upon the opinion of the Supreme Court in *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113. In that case this court granted an injunction on the ground that the interpretation of the Secretary of Labor of the word "locality" went so far beyond any possible proper application of the word as to defeat its meaning and to constitute an attempt arbitrarily to destroy the statutory mandate. The Supreme Court reversed and held that the complaining corporations in that case—bidders for government contracts—had no legal standing to question the Secretary's determination, and that only the United States could challenge any abuse of authority. There is nothing in the Miller Act which in any sense parallels the situation which existed in the *Lukens* case, and there is nothing, in

our view, in the opinion in the *Lukens* case which has any relation to the questions in the present case. In this action appellee sought to obtain a right under a bond executed pursuant to a statute of the United States. If, as we hold, no authority was granted the Secretary to require such a bond, there is certainly nothing in the *Lukens* case which destroys the right of a person sued on the bond to make that defense.

Third. Appellee argues that there is no valid reason why it may not recover upon the bond as a private obligation. There are two answers to this contention: one, that the complaint counts specifically upon a statutory bond; the other, that a suit in the name of the United States cannot be brought upon a voluntary bond given to secure the performance of a contract with the United States, unless some federal statute authorizes it. *United States* v. *Faircloth*, 49 App. D. C. 323, 265 Fed. 963; *Penn Iron Co.* v. *Trigg*, 106 Va. 557, 56 S. E. 329, *writ of error dismissed*, 215 U. S. 611.

We are by no means unmindful of the strong equities of appellee's case, and we would, if we could, enforce them. But since, as we view the case, to do so would involve the setting aside of an established rule of law and the introduction of uncertainty and doubt in its place, we are, as we think, impelled to reverse the judgment below and remand the case to the District Court for a new trial in accordance with this opinion.

Reversed.

[fol. 183] In United States Court of Appeals for the District of Columbia, April Term, 1941

No. 7784

Alexander D. Irwin and Archibald O. Leighton, Trading as Irwin & Leighton, and United States Guarantee Company, a Corporation, Appellants,

vs.

United States of America to the Use of Noland Company, Incorporated, a Corporation

Judgment—July 28, 1941

Special Appeal from the District Court of the United States for the District of Columbia.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby reversed with costs, and that this cause be, and the same is hereby, remanded to the said District Court for a new trial in accordance with the opinion of this Court.

Per Mr. Chief Justice Groner.

July 28, 1941.

[fol. 184] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER FOR TRANSCRIPT AND DESIGNATION OF RECORD—Filed August 25, 1941

The Clerk will please prepare a transcript on application for certiorari to the Supreme Court of the United States in the above-entitled cause, including therein the following:

1. The printed record in the United States Court of Appeals.
2. Minute entry showing argument of cause.
3. Opinion of the court.
4. The judgment or decree.
5. This designation.
6. Clerk's certificate.

Bynum E. Hinton, Alexander M. Heron, Attorneys for Appellee, Munsey Building, Washington, D. C.

Service of a copy of the foregoing acknowledged this 25th day of August 1941.

(s.) A. M. Holcombe, Prentice E. Edrington, Counsel for Appellants.

[fol. 185] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 186] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 10, 1941

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 187] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING RECORD—Filed November 25, 1941

The clerk of the Court will please omit from the printed record the following:

Page 51, line 15, commencing "Mr. Collins asked * * *", to line 21, ending "* * * to your bill, H. R. 2068." Line 24, beginning "Mr. Taylor. Mr. Chairman * * *", to line 37, ending "* * * you?"

Page 57, line 2, commencing "Mr. McLaughlin. * * * to line 34, ending "* * * more premium".

Page 61, line 9, commencing "Statement of Honorable Theodore Christianson", and ending line 30, "* * * it is short. (Laughter)"

Page 63, line 36, commencing "In United States vs. McCord * * *", to end of page.

Page 64 to page 65 inclusive.

Page 66, line 2, commencing "Vania to settle at a discount * * *", to line 47, ending "* * * too low a price * * *".

[fol. 188] Page 67, line 3, beginning "United States Code * * *" to end of page.

Page 68, line 2, commencing "case; and I know * * *", to line 27, ending "* * * of the contract price". Line 37, commencing "Now, there was * * *", to end of page.

Page 69 to page 82 inclusive.

Page 83, line 10, commencing "Mr. Miller. The meeting * * *", to end of page.

Page 84 to page 104 inclusive.

Page 105, line 17, commencing "Mr. Miller. Mr. Witman, this * * *", to end of page.

Page 106 to page 108 inclusive.

Page 110, line 8, commencing "Mr. Perkins. The difficulty * * *", to end of page.

Page 111.

Page 112, line 2, commencing "type of dual bond * * *", to line 7, ending "* * * labor and material men".

Page 113, line 13, commencing "Mr. Miller. It is * * *", to end of page.

Page 114, line 9, commencing "Mr. Miller. Gentlemen * * *", to end of page.

Page 115 to page 128 inclusive.

Page 139, line 12, commencing "Treasury Department", to end of page.

[fol. 189] Page 140.

November 24, 1941.

Bynum E. Hinton, Alexander M. Heron, Munsey Building, Washington, D. C., Attorneys for Petitioner.

Amasa M. Holcombe, Prentice E. Edrington, Munsey Building, Washington, D. C., Attorneys for Respondents.

[fol. 190] [File endorsement omitted.]

Endorsed on Cover: File No. 45,986. U. S. Court of Appeals, District of Columbia. Term No. 658. United States of America, To the Use of Noland Company, Incorporated, Petitioner, vs. Alexander D. Irwin and Archibald O. Leighton, Trading as Irwin and Leighton, et al. Petition for a writ of certiorari and exhibit thereto. Filed September 26, 1941. Term No. 658 O. T. 1941.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 653

UNITED STATES OF AMERICA, TO THE USE OF NOLAND COMPANY, INCORPORATED, A CORPORATION, *Petitioner*,

v.

ALEXANDER D. IRWIN AND ARCHIBALD O. LEIGHTON, TRADING AS IRWIN AND LEIGHTON, AND UNITED STATES GUARANTEE COMPANY, A CORPORATION, *Respondents*.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BYNUM E. HINTON,
ALEXANDER M. HERON,
Munsey Building,
Washington, D. C.,
Attorneys for Petitioner.

September 26, 1941.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No.

UNITED STATES OF AMERICA, TO THE USE OF NOLAND COMPANY, INCORPORATED, A CORPORATION, *Petitioner*,

v.

ALEXANDER D. IRWIN AND ARCHIBALD O. LEIGHTON, TRADING AS IRWIN AND LEIGHTON, AND UNITED STATES GUARANTEE COMPANY, A CORPORATION, *Respondents*.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia, reversing the order of the United States District Court for the District of Columbia denying respondents' motion to dismiss the complaint herein, treated as a motion for judgment.

MATTER INVOLVED.

The United States, acting through the Secretary of the Interior, entered into a contract with the respondents, Irwin & Leighton for the construction of a library building (R. 2-3) at the Howard University, a private corporation created under an Act of Congress (R. 170-173). The

building was erected with moneys of the United States allocated by the President of the United States under authority of the National Industrial Recovery Act, infra, pp. 4-5, upon land owned by the University (R. 147-8). As a condition of the contract the Secretary required the respondents to give to the United States a bond with surety in the penal sum of $408,612.00, conditioned for the payment of all persons furnishing labor and material for the work (R. 22-23). The petitioner and other persons who have claims pending in suits below furnished material for use and which was used in the work and for which they have not been paid. They accordingly brought suit in conformity with the procedural requirements of the Miller Act (infra, pp. 2-4). The District Court held that the petitioner was entitled to recover on the bond. The Court of Appeals for the District of Columbia reversed the District Court's judgment and held that the building here involved was not a public work of the United States and that accordingly there could be no recovery upon the bond.

JURISDICTION.

The jurisdiction of this court rests upon section 240 (a) of the Judicial Code, Act of February 13, 1925, c. 229, 43 Stat., 938. The judgment of the Court of Appeals for the District of Columbia was rendered on July 28, 1941. (R. 183)

The statutes involved are the so-called Miller Act, 40 U. S. C. A., 270 a, b, c, Act of August 24, 1935, c. 642, 49 Stat. 793:

> "270a. (a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor";
>
> "(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and

in such amount as he shall deem adequate for the protection of the United States.

"(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

"(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

"(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified, in subsection (a) of this section. (Aug. 24, 1935, c. 642, sec. 1, 49 Stat. 793.)

"270b.

"(a) * * *

"(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any

costs or expenses of any such suit. (Aug. 24, 1935, c. 642, sec. 2, 49 Stat. 794.)

and the National Industrial Recovery Act of June 16, 1933, c. 90, 48 Stat. 200-210, 40 U. S. C. A., 401-411:

"401. Federal Emergency Administration of Public Works; Creation; Officers and Employees; Exemption from Civil Service Laws and Classification Act; Duration of Laws

"(a) To effectuate the purposes of this chapter, the President is hereby authorized to create a Federal Emergency Administration of Public Works, all the powers of which shall be exercised by a Federal Emergency Administrator of Public Works (hereafter referred to as the 'Administrator'), and to establish such agencies, to accept and utilize such voluntary and uncompensated services, to appoint, without regard to the civil service laws, such officers, and employees, and to utilize such Federal officers and employees, and with the consent of the State, such State and local officers and employees as he may find necessary, to prescribe their authorities, duties, responsibilities, and tenure, and, without regard to chapter 13 of Title 5, to fix the compensation of any officers and employees so appointed. The President may delegate any of his functions and powers under this chapter to such officers, agents, and employees as he may designate or appoint. * * *

* * * * * * * * * * *

"402. Program of Public Works; Preparation and Contents.

"The Administrator, under the direction of the President, shall prepare a comprehensive program of public works; which shall include among other things the following: * * * (c) any projects of the character heretofore constructed or carried on either directly by public authority, or with public aid to serve the interests of the general public; * * *

* * * * * * * * * * *

"409. Rules and Regulations; Penalty for Violation.

"The President is authorized to prescribe such rules and regulations as may be necessary to carry out the purposes of this chapter, and any violation of any such rule or regulation shall be punishable by fine of not to exceed $500 or imprisonment not to exceed six months, or both. * * *"

"EXECUTIVE ORDER (No. 6929)

"DELEGATING CERTAIN FUNCTIONS AND POWERS TO THE FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS.

"By virtue of and pursuant to the authority vested in me by section 201 (a) of the National Industrial Recovery Act, approved June 16, 1933, 48 Stat. 195 (hereinafter referred to as the 'Act'), I hereby delegate to the Federal Emergency Administrator of Public Works the following functions and powers:

* * * * * * * * * *

"2. To alter, amend, or waive any or all rules and regulations set forth in Executive Order No. 6252 of August 19, 1933, and any other rule or regulation promulgated by the President under the authority of section 209 of said Act, and to prescribe pursuant to the authority of the said section 209 any other rules or regulations as are necessary to carry out the purposes of said Act; Provided, however, no rule or regulation the violation of which is made punishable by fine or imprisonment under the said section 209 shall become effective until approved by me. (Promulgated Dec. 26, 1934.)

* * * * * * * * * *

QUESTIONS.

The questions presented are:

(1) Is this a public work within the meaning of the statute requiring the taking of the bond?

(2) When the Secretary of the Interior, as a contracting officer of the United States, required the respondents to give a bond conditioned for the payment of persons furnish-

ing labor and material for the work, may a court review the propriety of his action and determine that, in the absence of express statutory authority to take such a bond, it is unenforceable and void?

(3) Is it not within the inherent power of the Secretary, as a contracting officer, to take such a bond, and may not the petitioner enforce it as a third party beneficiary without regard to express statutory authorization?

(4) May not the Secretary, as a contracting officer of the United States, and pursuant to his own rule-making authority as Administrator of Public Works, require such a bond to be taken? And when so taken, is it not enforceable?

REASONS FOR ALLOWANCE.

I. The decision of the Court below is in direct conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit, in *Peterson v. United States*, 119 F. (2d) 145, decided April 14, 1941, and reported June 2, 1941, holding that the term "public work" as used by Congress is "without technical meaning and is to be understood in its plain, obvious and rational sense."

II. The court below failed to give proper effect to the decision of this court in *Perkins v. Lukens Steel Co.*, 310 U. S. 113, holding that the terms and conditions of public contracts as drawn by the administrative branch of the government are not subject to judicial supervision.

III. The court below failed to give recognition to the necessarily inherent power of an administrative officer to make provision in a public contract for payment to labor and material suppliers, as a proper incident of the authority to contract, without regard to express statutory direction.

Respectfully submitted,

BYNUM E. HINTON,
ALEXANDER M. HERON,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No.

UNITED STATES OF AMERICA, TO THE USE OF NOLAND COMPANY, INCORPORATED, A CORPORATION, *Petitioner*,

v.

ALEXANDER D. IRWIN AND ARCHIBALD O. LEIGHTON, TRADING AS IRWIN AND LEIGHTON, AND UNITED STATES GUARANTEE COMPANY, A CORPORATION, *Respondents*.

BRIEF.

OPINIONS BELOW.

Neither the opinion of the District Court (R. 7) nor the Court of Appeals (R. 177-182) is reported as yet.

STATEMENT OF CASE.

In addition to the facts set out in the petition it should be pointed out that by an Act of Congress of December 13, 1928, 45 Stat. 1021, (R. 173) the Howard University is subject to annual inspection by the Bureau of Education, and a yearly report making a full exhibit of the affairs of the University is presented to Congress annually. The University in these respects is perhaps anomalous in its relation to the Federal Government. More than one-half of its annual operating expenses for the years 1935, 1936, 1937 were contributed by the United States (R. 157). Only one

building was erected at the University with private funds since 1910 (R. 168). The United States contributed upwards of three million five hundred thousand dollars for buildings at the University between 1933 and 1939 (R. 169) and all of this from Public Works funds (R. 167).

SPECIFICATION OF ERRORS.

The Court of Appeals erred:

(1) In holding that the library building was not a public work of the United States within the meaning of the Miller Act.

(2) In undertaking to review the authority of the contracting officer of the United States to take the bond here sued upon.

(3) In denying the inherent authority of the contracting officer to take this bond as an incident of his power to contract on behalf of the United States.

(4) In denying the petitioner a right of recovery upon the bond as upon a private obligation for the benefit of a third party.

ARGUMENT.

I. The Decision Below Conflicts with that of the Court of Appeals for the Sixth Circuit Under Which this Building Would be a "Public Work."

In *Peterson v. United States*, 119 F. (2d) 145, the Circuit Court of Appeals for the Sixth Circuit held that where a contract is entered into by the United States for the construction of a tunnel upon property apparently belonging to a privately owned public service corporation operated for the profit of its shareholders, the Pennsylvania Railroad Company, the work is nevertheless sufficiently a public work within the meaning of the statute to permit recovery upon the bond taken by the United States to secure payment for labor and materials, even though the ownership was at no time in the United States. The work in the *Peterson*

case was an incident of a flood prevention program carried out by the Public Works Administrator in conjunction with a water district incorporated under the laws of Ohio.

The court below has held that where a contract was entered into by the United States for the building of a library building upon land owned by an educational institution chartered by Congress (170-3) and to a considerable extent subject to supervision by the United States (R. 173), the work was not a public work, and that there could be no recovery upon the bond taken by the United States to secure payment to persons furnishing labor and material for the building. The two decisions are in obvious conflict and point the way to greater and almost hopeless confusion in future decisions, since the character of work carried on by the Public Works Administration with the three billion three hundred million dollar fund which was at its disposal is of the most varying kind and scope. The work which was being performed in each of these cases was under the authority of the Public Works Section of the National Recovery Act. Under the two decisions as now standing, Federal Courts will be left to pick and choose as to whether they think the particular work involved is sufficiently used in public service to justify enforcing the provisions of the bond. Obviously such a situation ought not to be permitted.

The Court of Appeals for the Sixth Circuit has taken a broad view of the term "public work" and in effect has upheld the authority of the administrative officers in taking bonds similar to the one involved in this case. The court below has taken a narrow and historical view, concluding that unless the work were actually owned by the United States it was not "public" within the meaning of the statute. If the administrative officer charged with the enforcement of the statute has taken the bond, his action should be sustained, and especially is this true where consideration has been paid for the bond which by its plain term is an engagement solely to protect furnishers of labor and material.

The Court of Appeals for the Sixth Circuit in the *Peterson* case said:

> "The term 'public work' as used in the act is without technical meaning and is to be understood in its plain, obvious and rational sense. The Congress was not dealing with mere technicalities in the passage of the Act in question. 'Public work' as used in the Act includes any work in which the United States is interested and which is done for the public and for which the United States is authorized to expend funds. Undoubtedly the work of flood control and the promotion of commerce among the states, by the improvement of rivers and harbors, is public so far as it promotes a public object. From the standpoint that it promotes the benefit of a privately owned railroad, it is in a sense, private, but nonetheless public, although incidentally promoting private advantage.
>
> * * * *
>
> "The case of Title Guaranty & Trust Company v. Crane Company, 219 U. S. 24, 35, 31 S. Ct. 140, 55 L. Ed. 72, so strongly relied on by appellants, is without point. In that case, the court was considering the applicability of the statute to a contract, to secure which the bond was given, for the construction and delivery of a single screw wooden steamer for the United States. The surety there was attempting to confine the phrase 'public work' to structures of permanent nature attached to the soil which was its then understood meaning. The Supreme Court extended the phrase to cover any class of property belonging to the representative of the public whether or not attached to the soil. There is nothing in the opinion from which an inference may be drawn that ownership was the sole criterion. To so circumscribe the act would destroy its purpose. Many of the public works of the United States are on property which the United States is using temporarily. The case of Maiatico Construction Company v. United States, 65 App. D. C. 62, 79 F. 2d 418, also relied on by appellants, has no application. In that case, the United States contracted for the erection of three dormitory buildings of the Howard University, a private corporation. The Government had no title or interest in the

property and the school was not for public use, although it may have been remotely for public benefit.

"In recent years, enormous expenditures for public works have been made partly for the projects themselves as in the case at bar, but mostly to reduce unemployment and to stimulate business. However, there is no reason why mechanics, laborers and materialmen who do work, or furnish supplies on such projects as fall within the puryiew of the statute in question, should not have its benefits. In our opinion, the present improvements were 'public work' within the meaning of the act, and the bond, the subject of this action, a valid and enforceable obligation."

The distinction suggested by the Circuit Court of Appeals for the Sixth Circuit between its decision and *Maiatico Construction Co.* v. *United States*, 65 App. D. C. 62, 79 F. (2d) 418, that the Howard University was only "remotely for public benefit" is little more than a contribution to judicial courtesy. The sole purpose of the University is "* * * for the education of youth in the liberal arts and sciences * * *" (R. 170).

The Miller Act involved here is a substitute for the Heard Act of August 13, 1894, c. 280, 28 Stat. 278, 40 U. S. C. A. 270, as amended, and is subject to the same liberality of interpretation to accomplish its purpose. *Fleisher Engineering & Construction Co.* v. *United States*, 311 U. S. 15.

The view taken by the District Court was that since under the Industrial Recovery Act the construction of this library building was authorized as a part of the program of "public works" then that term as used in the subsequently enacted Miller Act must be understood to include this building. (Opinion of the District Court R. 7.) This is further supported by the statement of Congressman Duffy in the hearing on the Miller Act (R. 109):

"If this bill were passed by this Congress it would certainly be applicable to the public works program and that is the reason for its importance."

II. The Action of the Secretary of the Interior in Taking the Bond is Not Subject to Judicial Review.

The court below held that since the title to the land on which the library building was erected was not in the United States, but in the Howard University, it was not a public work within the historically accepted meaning of that term, and the Secretary of the Interior was in error in so considering it and in taking a bond pursuant to the Miller Act. The Miller Act is a directory statute requiring contracting officers of the United States to take such bonds, along with bonds to secure the performance of the contract, where contracts are entered into for the construction of public works of the United States. The conclusion so reached is contrary to the decision of this court in *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, in which it was decided that the action of a contracting officer in carrying out a statutory direction of the Congress as to the terms upon which public contracts are to be made, is not subject to judicial review. Such statutory provisions are in substance the directions of a principal to an agent, and if erroneously construed by the agent are to be corrected by the principal and not by the court. In the *Lukens Steel Company* case this court held that an interpretation of such a directory stafute, made by an administrative officer, although apparently contrary to all historical concept of the terms used in it, was not subject to the injunctive order of the courts at the instance of prospective bidders. In the *Lukens* case the judicial review was sought prior to the making of the contract. In the present case the contract was made, the bond given, and now the contractors deny its validity. If the decision of the court below is to stand, the effect of the decision in the *Lukens* case is nullified, for the contractor, instead of questioning the contract terms beforehand, may enter into it, and then refuse, with impunity, to abide by its terms.

It is held in the *Lukens* case that the terms and conditions upon which the Government contracts are exclusively a matter for administrative determination, subject to such direc-

tion as may be given by the Congress. Determination of the conditions upon which public contracts are to be let is not a part of the judicial function. It is idle to say that they are not subject to judicial veto before the contract is let, but may be subject to such veto afterwards.

The court below felt that uncertainty would result in the present case if a broader meaning were given to the term "public work". Surely there could be no greater uncertainty so far as the laborer or material furnisher is concerned than to discover that the plain but solemn obligation of the contractor to pay for the labor and material was unenforceable because of the remote fact that title to the land on which the building was constructed was not in the United States.

The view taken by the Department is found in the memorandum of the Solicitor (R. 26-28). It is that the taking of the bond is authorized under the regulatory power delegated to the Administrator of Public Works by the President pursuant to the Industrial Recovery Act. This was done by Executive order of the President No. 6929 (*supra* p. 5). The Administrator requires these bonds in all cases where the United States is party to the contract (R. 145-152, 30-31). The Department apparently continues to take these bonds.

III. The Obligation of the Bond Should Be Enforced Whether Within or Without the Confines of the Miller Act.

The bond given in the case (R. 22, 23) standing above is fully enforceable as a private obligation. It is a simple instrument requiring payment for all labor and material. Undoubtedly the Secretary, as a contracting officer of the Government, had inherent authority to require such a bond as a condition of the contract. It is mere incident of a building contract; such bonds are used in private business with increasing frequency. *McClare* v. *Massachusetts Bonding and Insurance Co.*, 266 N. Y. 371, 195 N. E. 129;

Aetna v. *Big Rock*, 180 Ark. 1, 20 S. W. (2nd) 180; *Bryan* v. *Page*, 109 Conn. 256, 146 Atl. 293. The right to recovery as a third party beneficiary upon such a sealed instrument had been previously recognized by the court in *Brackner-Mitchell* v. *Sun Indemnity Company*, 65 App. D. C. 178, 82 F. (2nd) 434. The court below seems to doubt the authority of the officer to take such a bond outside of the statute, although it had been conceded before. *Maiatico Construction Co.* v. *U. S.*, 65 App. D. C. 62, 79 F. (2nd) 418. The Miller Act compels contracting officers to take such bonds in all cases coming within its terms, while in Section 270 a (c) there is an express recognition of the authority of the officer to take bonds in cases other than those specifically enumerated.

> "(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section. (Aug. 24, 1935, c. 642, sec. 1, 49 Stat. 793)."

The printed bond form carries at its head a reference to the Miller Act, although no such reference is contained in its provisions. The court below was apparently of the view that if the bond were intended by the contracting officer to be a statutory bond, and it did not in fact come within the express terms of the statute, it could be given no recognition as representing the exercise of authority inherent in the officer without regard to the statute. It is submitted that this view is untenable, for if the courts are to inquire as to the source of authority under which the officer *believed* he was acting, only confusion can result. If the officer had the authority from any source, then his action in making the contract should be sustained.

It should be pointed out that the effect of the decision below is not only to strike down the payment bond in suit, but also to strike down the bond which the Secretary took to protect the United States against the consequence of

the respondents' default under the contract (R. 24, 25). Both bonds were taken under the same circumstances. The respondents actually paid their surety $8,172.25 as a premium for the two bonds (R. 26) and presumably this item is reflected in the contract price which the United States paid for the work.

The court below in denying the petitioner's argument that the action might be maintained as upon a private obligation, did so in part upon the ground that the complaint was brought in the name of the United States and otherwise conformed to the procedural requirements of the Miller Act. But all the facts necessary to sustain the action as upon a private obligation are set out in the complaint. The new rules certainly have enough elasticity to permit amendment by striking out the United States as the nominal plaintiff. It was to cover just such ritualistic objections that much of the changed procedure was devised. The petitioner had no choice but to proceed as upon a statutory bond, for if it did not, and the court ultimately determined that it was a statutory bond, then the action would fail for want of observance of the procedural requirements. The lower court commented that the surety was a non-resident, but as the surety has a resident process agent in the District of Columbia, this point has no bearing on the case nor was it raised by the parties.

CONCLUSION.

This work is a "public work" within the meaning of the statute as interpreted by the Court of Appeals for the Sixth Circuit and the District Court in this case. If the decision below is to stand, the result is that the United States in spending their own money to erect a building may not require the contractor to see to the payment of the labor and materials used in it and may not even take a bond to safeguard themselves against the contractor's failure to com-

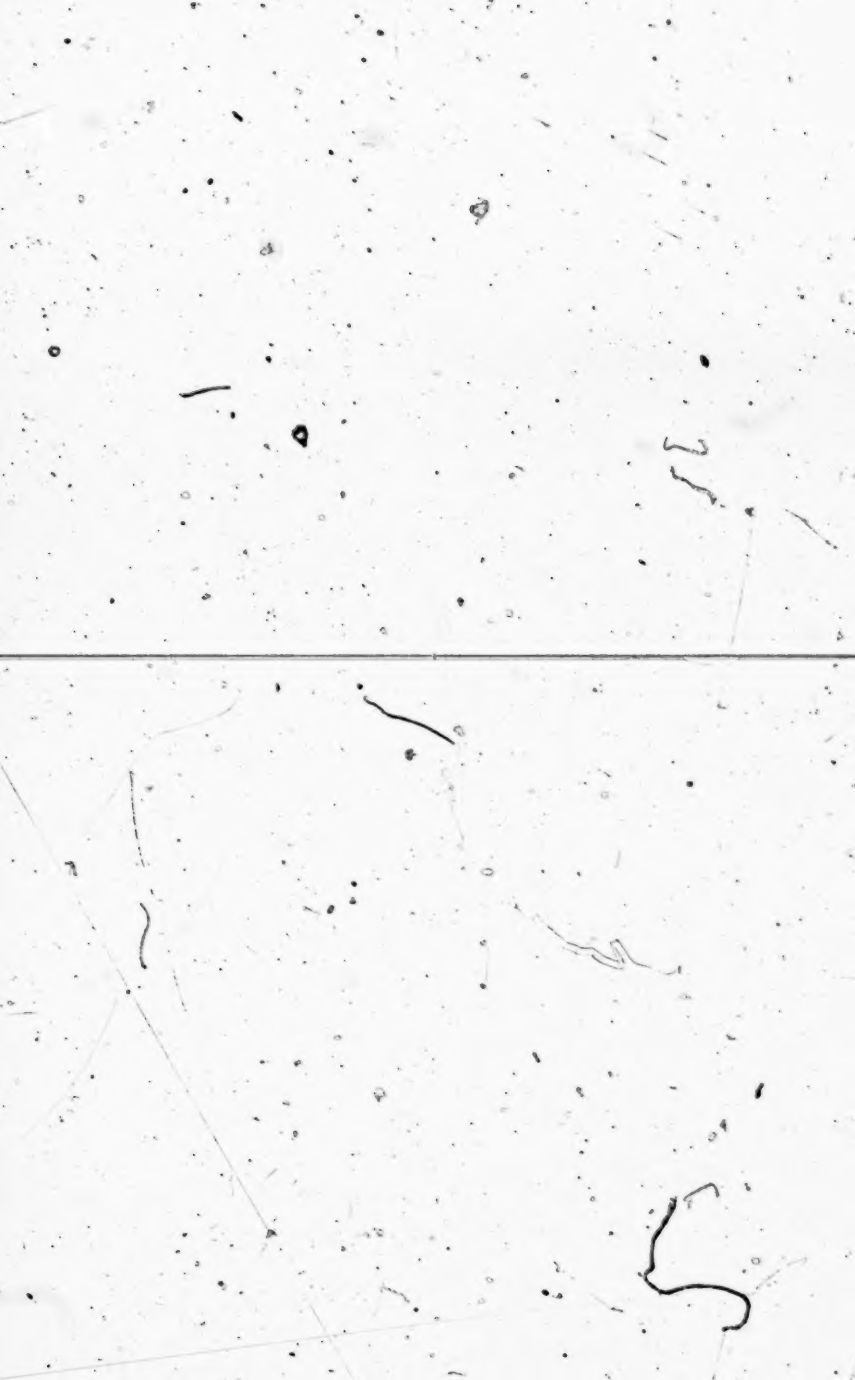
plete, and all of this in the face of section 270 a (c) of the Miller Act expressly recognizing the authority of the contracting officer to require just such protection.

It is submitted that the writ should issue as prayed.

Respectfully,

BYNUM E. HINTON,
ALEXANDER M. HERON,
Munsey Building,
Washington, D. C.,
Attorneys for Petitioner.

September 26, 1941.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 658.

UNITED STATES OF AMERICA, TO THE USE OF NOLAND COMPANY, INCORPORATED, A CORPORATION, *Petitioner,*

v.

ALEXANDER D. IRWIN AND ARCHIBALD O. LEIGHTON, TRADING AS IRWIN & LEIGHTON, AND UNITED STATES GUARANTEE COMPANY, A CORPORATION.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR PETITIONER.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 658.

UNITED STATES OF AMERICA, TO THE USE OF NOLAND COMPANY, INCORPORATED, A CORPORATION, *Petitioner*,

v.

ALEXANDER D. IRWIN AND ARCHIBALD O. LEIGHTON, TRADING AS IRWIN & LEIGHTON, AND UNITED STATES GUARANTEE COMPANY, A CORPORATION.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the Court of Appeals for the District of Columbia (R. 128-137) is reported in 122 F. (2d) 73. It is not yet reported in the District of Columbia Appeals Reports. The opinion of the District Court (R. 6) is not reported.

STATEMENT OF JURISDICTION.

Jurisdiction is conferred under Sec. 240 (a) of the Judicial Code, Act of February 13, 1925 c. 229, 43 Stat. 938. A writ of certiorari was granted (R. 139) upon the petition filed September 26, 1941, to review the judgment of the Court of Appeals rendered on July 28, 1941 (R. 137-138). The decision of the Court below is in conflict with the decision of the Court of Appeals for the Sixth Circuit in *Peterson* v. *United States*, 119 F. (2d) 145, holding that work of a character similar to this was public work of the United States within the meaning of the Miller Act. The Court below failed to apply properly the rule laid down in *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, holding that the contract terms imposed by contracting officers on behalf of the United States were not subject to judicial supervision. The case further turns about the construction of a Federal statute, the Miller Act, 40 U. S. C. A. 270 a, b, c, Act of August 24, 1935, c. 642, 49 Stat. 793. (*infra*, 20-22, Appendix)

STATEMENT OF THE CASE.

The United States, acting through the Secretary of the Interior, entered into a contract with the respondents, Irwin & Leighton, for the construction of a Library Building at the Howard University in the District of Columbia (R. 1-3). The cost of the work was $817,225 (R. 13). The Howard University owned the land upon which the building was erected (R. 109-110).

The building was constructed with moneys of the United States allocated by the President of the United States under authority of the National Industrial Recovery Act (R. 99) As a condition of the contract the Secretary required Irwin & Leighton as principals to give to the United States two bonds each in the penal sum of $408,612 and upon which the United States Guarantee Company was surety. One of the bonds was conditioned for the prompt payment to all persons supplying labor and material in the prosecution of the work (R. 20-21). The other was conditioned for the per-

formance of the contract (R. 22-23). The surety's premium charge for the bonds was $8,172.25 (R. 23).

The petitioner and several other persons who have claims in suits now pending in the District Court furnished material for use and which was used in the work and for which they have not been paid. They accordingly instituted suits upon the labor and material bond (R. 1-3) in conformity with the requirements of the Miller Act (*infra* 21, Appendix).

The respondents moved to dismiss the complaint upon the ground that the work to which the materials were furnished was not a public work of the United States (R. 3-4). The District Court heard the motion as a motion for summary judgment and denied it in a memorandum opinion, holding that petitioner was entitled to recover on the bond (R. 6), and entered an order accordingly (R. 6-7). The United States Court of Appeals allowed a special appeal (R. 8-9) and reversed the order of the District Court.

The Howard University is a private corporation chartered by an act of Congress and amendments thereto (R. 122-126, 107). Its sole purpose is for the education of youth in the liberal arts and sciences (R. 123) and it is prohibited by its charter from employing its funds or income or any part thereof for any purpose or object other than this (R. 125). Its charter is subject to alteration, amendment or repeal by the Congress (R. 125, Act of March 2, 1867, 14 Stat. L. 438). A revision of the charter made by Act of Congress of December 13, 1928 (45 Stat. 1021, 20 U. S. C. A. 123), authorizes annual appropriations by the United States to aid in the construction, development and maintenance of the University, further providing that the University shall be at all times open to inspection by the United States Bureau of Education and shall be inspected by the Bureau at least once a year. The same act also requires that an annual report making a full exhibit of the affairs of the University shall be presented to the Congress each year in the report of the Bureau of Education (R. 125-126). The Act of July 1, 1898, c. 546, (30 Stat. 624, 20 U. S. C. A. 122), requires the Presi-

dent and Directors of the University to report to the Secretary of the Interior the condition of the institution on the first day of July each year, embracing therein the number of pupils received and discharged or leaving for any cause during the preceding year and the number remaining; also the branches of knowledge and industry taught and the progress made therein, "together with a statement showing the receipts of the institution and from what sources, and its disbursements, and for what objects". The Act of March 3, 1899, c. 424, (30 Stat. 1110, 20 U. S. C. A. 122), provides that no part of the appropriations made by the Congress for the University should be used directly or indirectly for the support of the theological department or any sectarian denomination or religious instruction, and further that no part of the appropriations should be paid to the University until it should accord to the Secretary of the Interior authority to control and supervise the expenditures of all moneys paid under the appropriations.

The University enjoys the favor of the Federal Government to an extent almost without parallel. The budget of the University for a normal year is about $1,100,000 covering administration, instruction, maintenance and operation of the plant, including the boarding department. Annual contributions from the Federal Government toward this budget for the years 1935, 1936 and 1937 were about $675,000 a year (R. 109). In addition to this the United States spent $3,503,399.58 between 1933 and 1937 for buildings at the University (R. 122, 118-119). Only one building was built at the University in the thirty years preceding 1940 from funds obtained from other sources, and for that building $105,000 was contributed privately and $25,000 appropriated by the United States (R. 121).

SPECIFICATION OF ERRORS.

The Court of Appeals erred:

(1) In holding that the Library Building was not public work of the United States within the meaning of the Miller Act.

(2) In undertaking to review the authority of the contracting officer of the United States to take the bond here sued upon.

(3) In denying the inherent authority of the contracting officer to take this bond as an incident of his power to contract on behalf of the United States.

(4) In denying the petitioner a right of recovery upon the bond as upon a private obligation for the benefit of a third party.

ARGUMENT.

Summary.

1. The argument is based principally upon the proposition that work of this character is public work of the United States within the meaning of the Miller Act and an analysis of the facts is made in this light. It is in this field that the opinion of the Court of Appeals conflicts with the decision in *Peterson* v. *United States*, 119 F. (2d) 145.

2. It is further contended that the taking of the bond involved in this case was a function of the administrative branch of the Government. The requirement that the contractor furnish such a bond was well within the necessarily inherent power of the executive branch of the Government whether specifically authorized by statute or not.

3. The bond is a complete instrument in itself and as such is fully adequate to support an action as upon a private obligation. The fact that this complaint was cast in conformity with the procedural requirements of the Miller Act should not form a bar to a recovery by the beneficiaries.

4. A brief discussion of points contained in the opinion of the Court of Appeals, and not otherwise covered, forms the fourth section of the argument.

I. This Work is Public Work.

It will be observed that the Miller Act refers to "* * * any contract * * * for the construction, alteration or repair of any public building or public work of the United States * * *" (*infra* 20; Appendix). Hence it will be seen that the statute applies to any contract for the construction of any public work of the United States. It should be observed at the beginning that there may be a distinction between the term "public works" and the term "public work". The "public works" are ordinarily those more or less monumental edifices which are erected for the principal business of the state and stand to endure for time as an evidence of the achievement of the political body. There is on the other hand much necessary business of the Government which is relatively trivial in character but which is performed under contract. The product of this class of contracts would not be ordinarily associated with the buildings, fortifications and the like, which are usually thought of as constituting the "public works" of the United States. They are, however, work of the public and do fall within the broadly inclusive term "public work" as must all work of the state whether done under contract or otherwise. It was the intention of the statute to require bonds of the kind given here for every such contract exceeding $2,000 in amount. The monetary limitation is a positive indication that the Congress had intended to exempt only such contracts as were so small in amount that the likelihood of loss would scarcely warrant the formality of the bonds.

There is nothing in the ordinary meaning of the term which would exclude the work done in this case from the benefits of the statute.

> "Public works. All fixed works constructed or built for public use or enjoyment, as railroads, docks, canals, etc., or constructed with public funds and owned by the public; often specif., such works as constitute public improvements, as parks, museums, etc., as distinguished from those involved in the ordinary administration of the affairs of a community, as grading of roads, lighting of streets, etc."
>
> Webster's International Dictionary
> Second Edition.

Undoubtedly the absence of a lien right upon property owned by the United States motivated the passage of the labor and materialman's bond statutes, *Title Guaranty & Trust Co.* v. *Crane*, 219 U. S. 24. But rights arising under the bonds have never been held to be limited to the lien rights given in the various states, and go far beyond them. The bond affords protection to persons who have no direct contractual relation with the contractor, that is, subcontractors, under subcontractors. *U. S.* v. *American Surety Company*, 200 U. S. 197. The lien law of the District of Columbia does not extend that far, *Leitch* v. *The Central Dispensary & Emergency Hospital*, 6 App. D. C. 247, and this has not been changed, *Lipscomb* v. *Hough*, 52 App. D. C. 313, 286 F. 775.

The Court of Appeals turned its decision (R. 128-137) upon the ownership of the land rather than upon the character of the work. The pivot of the decision is set out more fully in the earlier case of *Maiatico Construction Co.* v. *United States*, 65 App. D. C. 62, 79 F. (2d) 418. There the character of the Howard University and its status as an educational institution was reviewed at great length. But the real question is whether the work, that is, the construction of this building by the United States, is "public work". In other words, was the procuring of the contract and the

expenditure of the funds under it, which in turn created the building, a work of the United States? The question is not whether the completed structure constituted one of the "public works" of the United States after its keys were presented to the University, nor does the case turn upon the question of whether the University is a public, private or quasi public institution. If the expenditure of the public moneys and the construction of the building, which are together a single transaction, represent a proper constitutional exercise of power by the United States, then the work is public work.

In *Peterson* v. *United States*, 119 F. (2d) 145 (C. C. A. 6th) the United States had entered into an arrangement with a Water Conservancy District for the improvement of the flood control, water conservation and navigation of certain rivers in Ohio. Funds were to be made available by the United States from the same Public Works funds which furnished the contract price for the Howard University work. The Conservancy District was organized under Ohio law. The proposed improvements necessitated the relocation of the roadbed of the Pennsylvania Railroad Company. To accomplish this end the United States entered into a contract with Peterson, a contractor, for the construction of a tunnel upon land which was not owned by the Federal Government but which was owned either by the Conservancy District or the Railroad Company. In connection with the contract the United States required a bond conditioned for payment to persons furnishing material under the Heard Act (Act of August 13, 1894, c. 280, 28 Stat. 278, 40 U. S. C. A. 270, as mended), and for which the Miller Act is a substitute. *Fleisher Engineering & Construction Co.* v. *United States*, 311 U. S. 15. Persons who furnished material in the Peterson case brought suit upon the bond which the United States had taken. The defense was raised that since the United States did not own the land upon which the tunnel was built, the work was not public work. The Court, in sustaining the validity of the bond, said:

"The term 'public work' as used in the act is without technical meaning and is to be understood in its plain, obvious and rational sense. The Congress was not dealing with mere technicalities in the passage of the Act in question. 'Public work' as used in the Act includes any work in which the United States is interested and which is done for the public and for which the United States is authorized to expend funds. Undoubtedly the work of flood control and the promotion of commerce among the states, by the improvement of rivers and harbors, is public so far as it promotes a public object. From the standpoint that it promotes the benefit of a privately owned railroad, it is in a sense, private, but nonetheless public, although incidentally promoting private advantage.

* * * * * * *

"The case of Title Guaranty & Trust Company v. Crane Company, 219 U. S. 24, 35, 31 S. Ct. 140, 55 L. Ed. 72, so strongly relied on by appellants, is without point. In that case, the court was considering the applicability of the statute to a contract, to secure which the bond was given, for the construction and delivery of a single screw wooden steamer for the United States. The surety there was attempting to confine the phrase 'public work' to structures of permanent nature attached to the soil which was its then understood meaning. The Supreme Court extended the phrase to cover any class of property belonging to the representative of the public whether or not attached to the soil. There is nothing in the opinion from which an inference may be drawn that ownership was the sole criterion. To so circumscribe the act would destroy its purpose. Many of the public works of the United States are on property which the United States is using temporarily. The case of Maiatico Construction Company v. United States, 65 App. D. C. 62, 79 F. (2d) 418, also relied on by appellants, has no application. In that case, the United States contracted for the erection of three dormitory buildings of the Howard University, a private corporation. The Government had no title or interest in the property and the school was not for public use, although it may have been remotely for public benefit.

"In recent years, enormous expenditures for public works have been made partly for the projects them-

selves as in the case at bar, but mostly to reduce unemployment and to stimulate business. However, there is no reason why mechanics, laborers and materialmen who do work, or furnish supplies on such projects as fall within the purview of the statute in question, should not have its benefits. In our opinion, the present improvements were 'public work' within the meaning of the act, and the bond, the subject of this action, a valid and enforceable obligation." Peterson v. U. S., 119 F. (2d) 145.

There can be no distinction between the principle involved in the Peterson case and the present case, except that the present case may be fairly said to be even clearer than the Peterson case. The work in the Peterson case was to be turned over to a public service corporation operated for the profit of its shareholders. The tunnel was a facility in the public service which the corporation rendered and from which it should reasonably expect to derive some profit. In the present case the corporation is not only a creature of the Congress subject to such change as the Congress might from time to time wish to make under the reservation contained in the charter, but it is organized solely for public service without profit. The service which it renders, the education of youth, is one of the vital concerns of the state. It is a service which is largely rendered by the state through the high school age. It may be noticed that in many of the states, state universities engage in similar work under public authority.

It would be startling to say that the education of youth is a proper governmental function through the high school or preparatory school but unconstitutional after that. Unquestionably the expenditure of the funds of the United States for the improvement of the Howard University and the assumption of the major portion of the financial burden of the operation of the University, are proper exercises of constitutional power.

"Argument that the lending functions of the Federal Land Banks are proprietary rather than governmental

> misconceives the nature of the Federal Government with respect to every function which it performs. The Federal Government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental. Graves v. N. Y., 306 U. S. 466, 477, 83 L. ed. 927, 931; 59 Sup. Ct. 595, 120 A. L. R. 114". *Federal Land Bank v. Bismarck Lumber Co.* (decided November 10, 1941), Law Ed. Advance Opinions Vol. 86, No. 1, p. 46.

Particularly would this be true in the District of Columbia, the government which is constitutionally entrusted to the Congress. Constitution, Article I, Section 8, Clause 17, *Capital Traction Co.* v. *Hof*, 174 U. S. 1. The use of moneys of the United States for the fostering and improvement of education in the District of Columbia cannot be seriously open to legal challenge.

The Miller Act here involved was passed on August 24, 1935. At the time of its passage there stood upon the statute books the National Industrial Recovery Act of June 16, 1933 (*infra* 22-25, Appendix), under which an appropriation of three billion three hundred million dollars had been made by the Congress for use as the President and Administrator of Public Works should determine under the authority delegated in the statute. Among the public works authorized by the statute were "any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public: * * *". (Sec. 402 c, *infra* 23, Appendix). The work undertaken in this case was of that character, for similar work had been done before (R. 114-121), *Maiatico Construction Co.* v. *United States*, *supra*. The District Court held that the Miller Act must be read in the light of the language of the previously enacted Industrial Recovery Act and that since this work was authorized by the general enactment in 1933 setting up the Public Works Program, it must be concluded that the Miller Act in 1935 contemplated that these works were also to be covered into the bond statute (R. 6). In the hearing before the sub-

committee of the Judiciary Committee of the House of Representatives considering the passage of the Miller Act it was remarked by one of the members, Congressman Duffy:

> "If this bill were passed by this Congress it would certainly be applicable to the public works program and that is the reason for its importance." (R. 73)

II. The Action of the Secretary in Taking the Bond is Not Subject to Judicial Review.

The Court of Appeals held that since the ownership of the land where this work was done was vested in the Howard University rather than in the United States, the work was not public work within the historically accepted meaning of that term and that as a result the Secretary of the Interior was in error in so considering it and in taking a bond under the Miller Act. The Miller Act is in substance a statutory direction to contracting officers of the United States requiring them to take such bonds along with bonds to secure the performance of the contracts which they make, where the contracts are for public work of the United States. If the executive branch fails to take the bond then the material furnisher is without remedy. The right springs primarily from the contractual terms of the bond rather than from the statute. *Babcock & Wilcox* v. *American Surety Co.*, 236 F. 340; *U. S.* v. *Stewart*, 288 F. 187; *U. S.* v. *Starr*, 20 F. (2d) 803.

The conclusion which the Court of Appeals reached is contrary to the decision of this Court in *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113. It was there decided that the action of a contracting officer in carrying out a statutory direction of the Congress as to the terms upon which public contracts are to be made is not subject to judicial review. Such statutory provisions are in substance the directions of a principal to an agent, and if erroneously construed by the agent, are to be corrected by the principal, that is, the Congress, and not by the courts. In the *Lukens Steel Co.* case it was held here that an interpretation of such a statute made by an administrative officer was not

subject to the injunctive order of the courts at the instance of prospective bidders. And this was true even though the interpretation appeared to be contrary to the historical concept of the terms used in it. In the *Lukens* case the judicial review was sought prior to the making of the contract. In the present case the contract was made, the bond given, and now the contractors deny its validity. "If the decision of the Court below is correct, the effect of the decision in the *Lukens* case would seem to be nullified, for the contractor may avoid any procedural difficulty by omitting to question the validity of the contract or bond beforehand, but entering into it, refuse with impunity to perform the obligations assumed.

It is held in the *Lukens* case that the terms and conditions upon which the Government enters into contracts are exclusively matters for administrative determination, subject to such direction as may be given by the Congress. Determination of conditions upon which public contracts are to be let is not a part of the judicial function. From this it may be concluded that the requirements set up by contracting officers are not subject to judicial veto whether it is sought before the contract is made or afterward.

The Department of the Interior had occasion to consider the same question which is involved here. Its view is found in the memorandum of its Solicitor (R. 23-25). He concluded that a bond to secure the payment to furnishers of labor and material might be properly required by the Department under the regulatory power delegated to the Administrator of Public Works by the President, pursuant to the Industrial Recovery Act. This was done by an Executive Order of the President No. 6929 (*infra* 26, Appendix). The authority was exercised by the Administrator in his Bulletin No. 51 (R. 26-28, 101), governing contracts for "Federal projects." This was a Federal project (R. 103-104). The Administrator requires these bonds in all cases where the contract is made by the United States (R. 96-104). The Department apparently continues to take these bonds.

III. The Bond Should Be Enforced Whether Within or Without the Confines of the Miller Act.

The bond upon which this suit was brought (R. 20-21) is fully enforcible as a private obligation upon the terms within the four corners of the instrument. It is a simple covenant requiring payment for all labor and material furnished to the work. Undoubtedly the Secretary as a contracting officer of the Government had inherent authority to require such a bond as a condition of the contract. Bonds for the protection of the United States had been exacted before the statutory requirement was passed. *U. S.* v. *National Surety Co.*, 92 F. 549. If it were desired to extend the obligation of the bond to protect furnishers of labor and material, undoubtedly the power to do so rests in the executive branch of the Government, although there may have been hesitation to exercise it without a specific authorization from the Congress, especially since the notion of using such bonds was a novelty in 1894, when the Heard Act was passed. It would seem inescapable that the authority to make a contract on behalf of the United States carries with it by a necessary implication the authority to provide for all matters incidental to it. The requirement by the contracting officer of such a bond as given here, even without express statutory direction, is no more than the exercise of an implied authority. The Court below seemed to doubt the authority of the officer to take such a bond outside of the statute, although it had been conceded before. *Maiatico Construction Co.* v. *U. S.*, 65 App. D. C. 62, 68, 79 F. (2d) 418, 424.

While the Miller Act compels contracting officers to take such bonds in all cases coming within its terms, Sec. 270a (c) of the statute is an affirmative recognition of the authority necessarily resting in the contracting officer to take bonds in cases other than those specifically enumerated.

> "(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to

those or in cases other than the cases specified in subsection (a) of this section." (*Infra* 21, Appendix)

The requirement of a bond for the payment of labor and material furnished to the work is a mere incident of a building contract and such bonds are used in private business with increasing frequency. *McClare* v. *Massachusetts Bonding & Insurance Co.*, 266 N. Y. 371, 195 N. E. 129; *Aetna* v. *Big Rock*, 180 Ark. 1, 20 S. W. (2d) 180; *Byram* v. *Page*, 109 Conn. 256, 146 Atl. 293. An elaborate discussion of the subject is found in 77 A. L. R. 53. The right of recovery by third party beneficiary upon such a sealed instrument had been previously recognized in the District of Columbia in *Bruckner-Mitchell* v. *Sun Indemnity Co.*, 65 App. D. C. 178, 82 F. (2d) 434.

The printed bond form carries at its head a reference to the Miller Act, although no such reference is contained in its provisions. The Court below took the view that if the bond were intended by the contracting officer to represent a compliance with the requirement of the statute and it did not in fact come within the express terms of the statute, it could be given no recognition as representing an exercise of authority inherent in the officer without regard to the statute. It is submitted that this view is untenable and that the inquiry should not be directed so much to the particular source of the contracting officer's authority as to the question of whether he had any such authority from any source. If he did have the authority at all, then his action in making the contract should be sustained.

It must be pointed out that the effect of the decision below is not only to strike down the payment bond in suit here, but also to strike down the bond which the Secretary took to protect the United States against the consequence of the respondents' default under the contract. (R. 22-23) Both bonds were taken under the same circumstances. The respondents were actually charged $8,172.25 as a premium for the two bonds (R. 23), and presumably this item is reflected in the contract price which the United States

paid for the work. *Mason & Hanger Co.* v. *United States*, 56 C. Cls. 238, affirmed 260 U. S. 327.

The Court of Appeals in denying the petitioner's argument that the action might be maintained as upon a private obligation, did so in part upon the ground that the complaint was brought in the name of the United States and otherwise conformed to the procedural requirements of the Miller Act. But all of the facts necessary to sustain the action as upon a private obligation are set out in the complaint. The petitioner had but little choice to proceed as it did, since the time of suit is so limited under the Miller Act that the questions raised here could not have been determined within the allotted year beyond which the suits may not be brought. Such an objection is procedural only and the new rules are sufficiently elastic as to permit amendment by striking out the United States as the nominal plaintiff. It was because of objections of this kind that much of the changed procedure in the new rules was devised. It is submitted that the objection directed to the form in which the suit was brought is not of sufficient consequence to bar the petitioner's recovery.

IV. The Court of Appeals Decision.

There are a number of independent statements in the opinion of the Court of Appeals which should be briefly mentioned.

It was commented that the contractors had paid all their subcontractors in full (R. 130). This is doubtless an oversight, since the record is silent on this point.

While the conclusion is reached in the opinion of the Court below that "* * * the fact is that in the case we are considering the Secretary overlooked the fact that the Howard University is a private corporation * * *", it is hardly sustained by the record which shows the considered opinion of the Solicitor of the Interior Department advising that bonds were required under a similar contract for work at the Howard University (R. 23-25). At another point the

court remarked that the suit was brought against a non-resident surety, the intimation being that this was an obstacle to recovery. No such objection was raised by the respondents, doubtless because the surety, in order to qualify itself to do business in the District of Columbia, maintains a process agent for service of papers upon it in the District. This point, not being raised *in limine*, is waived, Federal Rules of Civil Procedure, Rule 12, b, h.

The suggestion in the opinion that the buildings of the University are subject to the operation of the mechanics lien statutes of the District is without force. Those statutes, like most mechanic lien statutes, provide a means whereby the claimant may impound the contract funds in the hands of the owner. Code of the District of Columbia, Title 25, Chap. 11, Sec. 351-356; Act of March 3, 1901, 31 Stat. 1384, c. 854, Sec. 1237-1242. The whole argument of the respondents is that the United States are not the *owner*. It follows that there never were and never would be any funds in the hands of the *owner* subject to the operation of the lien statutes. The funds remain in the possession of the United States until paid over to the contractors under the terms of the contract (R. 15-16). The furnishers of labor and material are without the slightest protection from the lien statutes, and if the respondents prevail, without any of the collateral protection ordinarily afforded to subcontractors and supplymen under building contracts.

The Court below has taken a narrow and historical view of the statute as outlined in the *Maiatico* case, *supra*. From such a view it would necessarily follow that the meaning of the statute was crystallized and its limitation fixed at the time of its enactment. On the contrary the statute is a direction to the administrative branch of the Government as to a condition to be fulfilled on the making of contracts for public work. It is as elastic as the activity of the Government and is broad enough to follow these activities to every field into which they may go.

It has been repeated here many times that the Miller Act and the preceding Heard Act are to be liberally construed

to effect the beneficent purpose for which they were enacted.

> "In construing the earlier Act, the Heard Act, for which the Miller Act is a substitute, we observed that it was intended to be highly remedial and should be construed liberally. * * * 'Technical rules otherwise protecting sureties from liability have never been applied in proceedings under this statute.' Illinois Surety Co. vs. John Davis Co., 244 U. S. 376, 61 L. ed. 1206, 37 Sup. Ct. 614, supra. The same principle should govern the application of the Miller Act." Fleisher Engineering & Construction Co. vs. U. S., 311 U. S. 15.

It was said in reference to the Heard Act in a case allowing recovery for rental of cars and equipment and the expense of unloading freight, that:

> "In every case which has come before this court, where labor and materials were actually furnished for and used in part performance of the work contemplated in the bond, recovery was allowed, if the suit was brought within the period prescribed by the act." Illinois Surety Co. vs. John Davis Co., 244 U. S. 376.

CONCLUSION.

The work here involved is "public work" within the meaning of the statute as interpreted both by the Court of Appeals for the Sixth Circuit in the *Peterson* case, *supra*, and by the District Court in this case. The result of the decision of the Court below will be that the United States in spending their own money to erect a building may not require the contractor to see to the payment for labor and materials used in it and may not take a bond to safeguard themselves against the contractor's failure to complete, even in face of the express recognition contained in Section 270 a (c) of the Miller Act recognizing the authority of the contracting officer to require just such protection in cases other than those specifically enumerated in the statute. The denial by the respondents of liability under their bond expressly requiring them to pay for labor and material used

in their work is singularly lacking in good conscience, after the contract and its benefits had been procured by them upon the strength of their compliance with this requirement of the Department. It is submitted that the decision of the Court of Appeals should be reversed and the order of the District Court affirmed.

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APPENDIX.

The Miller Act, 40 U. S. C. A. 270 (a), (b), (c).

"270. BONDS OF CONTRACTORS FOR PUBLIC BUILDINGS OR WORKS; RIGHTS OF PERSONS FURNISHING LABOR AND MATERIALS.

* * * * * * * * * *

"270a. SAME; WAIVER OF BONDS COVERING CONTRACT PERFORMED IN FOREIGN COUNTRY.

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as 'contractor':

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section. (Aug. 24, 1935, c. 642, par. 1, 49 Stat. 793)."

"270b. SAME; RIGHTS OF PERSONS FURNISHING LABOR OR MATERIAL.

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in con-

troversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit. (Aug. 24, 1935, c. 642, par. 2, 49 Stat. 794)."

"270c. SAME; RIGHT OF PERSON FURNISHING LABOR OR MATERIAL TO COPY OF BOND

The Comptroller General is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be prima facie evidence of the contents, execution, and delivery of the original, and, in case final settlement of such contract has been made, a certified statement of the date of such settlement, which shall be conclusive as to such date upon the parties. Applicants shall pay for such certified copies and certified statements such fees as the Comptroller General fixes to cover the cost of preparation thereof. (Aug. 24, 1935, c. 642, par. 3, 49 Stat. 794)."

The National Industrial Recovery Act, Title 40 United States Code: 401, 402, 407, 409, 411.

"401. FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; CREATION; OFFICERS AND EMPLOYEES; EXEMPTION FROM CIVIL SERVICE LAWS AND CLASSIFICATION ACT; DURATION OF LAW

(a) To effectuate the purposes of this chapter, the President is hereby authorized to create a Federal Emergency Administration of Public Works, all the powers of which shall be exercised by a Federal Emergency Administrator of Public Works (hereafter referred to as the 'Administrator'), and to establish such agencies, to accept and utilize such voluntary and uncompensated services, to appoint, without regard to the civil service laws, such officers and employees, and to utilize such Federal officers and employees, and with the consent of the State, such State and local officers and employees as he may find necessary, to

prescribe their authorities, duties, responsibilities, and tenure, and, without regard to chapter 13 of Title 5, to fix the compensation of any officers and employees so appointed. The President may delegate any of his functions and powers under this chapter to such officers, agents, and employees as he may designate or appoint. * * * (June 16, 1933, c. 90, Title II, par. 201, 48 Stat. 200).

* * * * * * * * * *

402. PROGRAM OF PUBLIC WORKS; PREPARATION AND CONTENTS.

The Administrator, under the direction of the President, shall prepare a comprehensive program of public works, which shall include among other things the following: (a) Construction, repair, and improvement of public highways and parkways, public buildings, and any publicly owned instrumentalities and facilities; (b) conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy, and construction of river and harbor improvements and flood control and also the construction of any river or drainage improvement required to perform or satisfy any obligation incurred by the United States through a treaty with a foreign Government heretofore ratified and to restore or develop for the use of any State or its citizens water taken from or denied to them by performance on the part of the United States of treaty obligations heretofore assumed; Provided, That no river or harbor improvements shall be carried out unless they shall have heretofore or hereafter been adopted by the Congress or are recommended by the Chief of Engineers of the United States Army; (c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public; (d) construction, reconstruction, alteration, or repair under public regulation or control of low-cost housing and slum-clearance projects; (e) any project (other than those included in the foregoing classes) of any character heretofore eligible for loans under subsection (a) of section 605b of Title 15, and paragraph (3) of such subsection (a) shall for such purposes be held to include loans for the construction or completion of hospitals the opera-

tion of which is partly financed from public funds, and of reservoirs and pumping plants and for the construction of dry docks; and if in the opinion of the President it seems desirable, the construction of naval vessels within the terms and or limits established by the London Naval Treaty of 1930 and of aircraft required therefor and construction of heavier-than-air aircraft at a technical construction for the Army Air Corps and such Army housing projects as the President may approve, and provision of original equipment for the mechanization or motorization of such Army tactical units as he may designate; *Provided, however,* That in the event of an international agreement for the further limitation of armament, to which the United States is signatory, the President is hereby authorized and empowered to suspend, in whole or in part, any such naval or military construction or mechanization and motorization of Army units; *Provided further,* That this chapter shall not be applicable to public works under the jurisdiction or control of the Architect of the Capitol or of any commission or committee for which such Architect is the contracting and or executive officer. (June 16, 1933, c. 90, Title II, par. 202, 48 Stat. 201);

* * * * * * * * * * *

407. Assignments by Contractors; Approval; Application of Funds; Penalties.

(a) For the purpose of expediting the actual construction of public works contemplated by this chapter and to provide a means of financial assistance to persons under contract with the United States to perform such construction, the President is authorized and empowered, through the Administrator or through such other agencies as he may designate or create, to approve any assignment executed by any such contractor, with the written consent of the surety or sureties upon the penal bond executed in connection with his contract, to any national or State bank, of his claim against the United States, or any part of such claim, under such contract; and any assignment so approved shall be valid for all purposes, notwithstanding the provisions of section 15 of Title 41 and section 203 of Title 31.

(b) The funds received by a contractor under any advances made in consideration of any such assignment are hereby declared to be trust funds in the hands of such con-

tractor to be first applied to the payment of claims of subcontractors, architects, engineers, surveyors, laborers, and material men in connection with the project, to the payment of premiums on the penal bond or bonds, and premiums accruing during the construction of such project on insurance policies taken in connection therewith. Any contractor and any officer, director, or agent of any such contractor, who applies, or consents to the application of, such funds for any other purpose and fails to pay any claim or premium hereinbefore mentioned, shall be deemed guilty of a misdemeanor and shall be punished by a fine of not more than $1,000 or by imprisonment for not more than one year, or by both such fine and imprisonment.

(c) Nothing in this section shall be considered as imposing upon the assignee any obligation to see to the proper application of the funds advanced by the assignee in consideration of such assignment. (June 16, 1933, c. 90, Title II, par. 207, 48 Stat. 205).

* * * * * * * * * * * *

409. Rules and Regulations; Penalty for Violation

The President is authorized to prescribe such rules and regulations as may be necessary to carry out the purposes of this chapter, and any violation of any such rule or regulation shall be punishable by fine of not to exceed $500 or imprisonment not to exceed six months, or both. (June 16, 1933, c. 90, Title II, par. 209, 48 Stat. 206).

* * * * * * * * * * * *

411. Appropriation

For the purposes of this chapter there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $3,300,000,000. The President is authorized to allocate so much of said sum, not in excess of $100,000,000, as he may determine to be necessary for expenditures in carrying out section 601 to 613 of Title 7, and the purposes, powers, and functions heretofore and hereafter conferred upon the Farm Credit Administration. (June 16, 1933, c. 90, Title II, par. 220, 48 Stat. 210).

* * * * * * * * * * * *

Executive Order of the President No. 6929.

"DELEGATING CERTAIN FUNCTIONS AND POWERS TO THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

By virtue of and pursuant to the authority vested in me by section 201 (a) of the National Industrial Recovery Act, approved June 16, 1933, 48 Stat. 195 (hereinafter referred to as the 'Act'), I hereby delegate to the Federal Emergency Administrator of Public Works the following functions and powers:

* * * * * * * * * *

2. To alter, amend, or waive any or all rules and regulations set forth in Executive Order No. 6252 of August 19, 1933, and any other rule or regulation promulgated by the President under the authority of section 209 of said Act, and to prescribe pursuant to the authority of the said section 209 any other rules or regulations as are necessary to carry out the purposes of said Act; Provided, however, no rule or regulation the violation of which is made punishable by fine or imprisonment under the said section 209 shall become effective until approved by me. (Promulgated Dec. 26, 1934)

* * * * * * * * * *"

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 658

UNITED STATES OF AMERICA, To the Use of NOLAND COMPANY, INCORPORATED, a Corporation, *Petitioner*,

v.

ALEXANDER D. IRWIN AND ARCHIBALD O. LEIGHTON, Trading as IRWIN & LEIGHTON, AND UNITED STATES GUARANTEE COMPANY, a Corporation.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

PETITIONER'S REPLY BRIEF.

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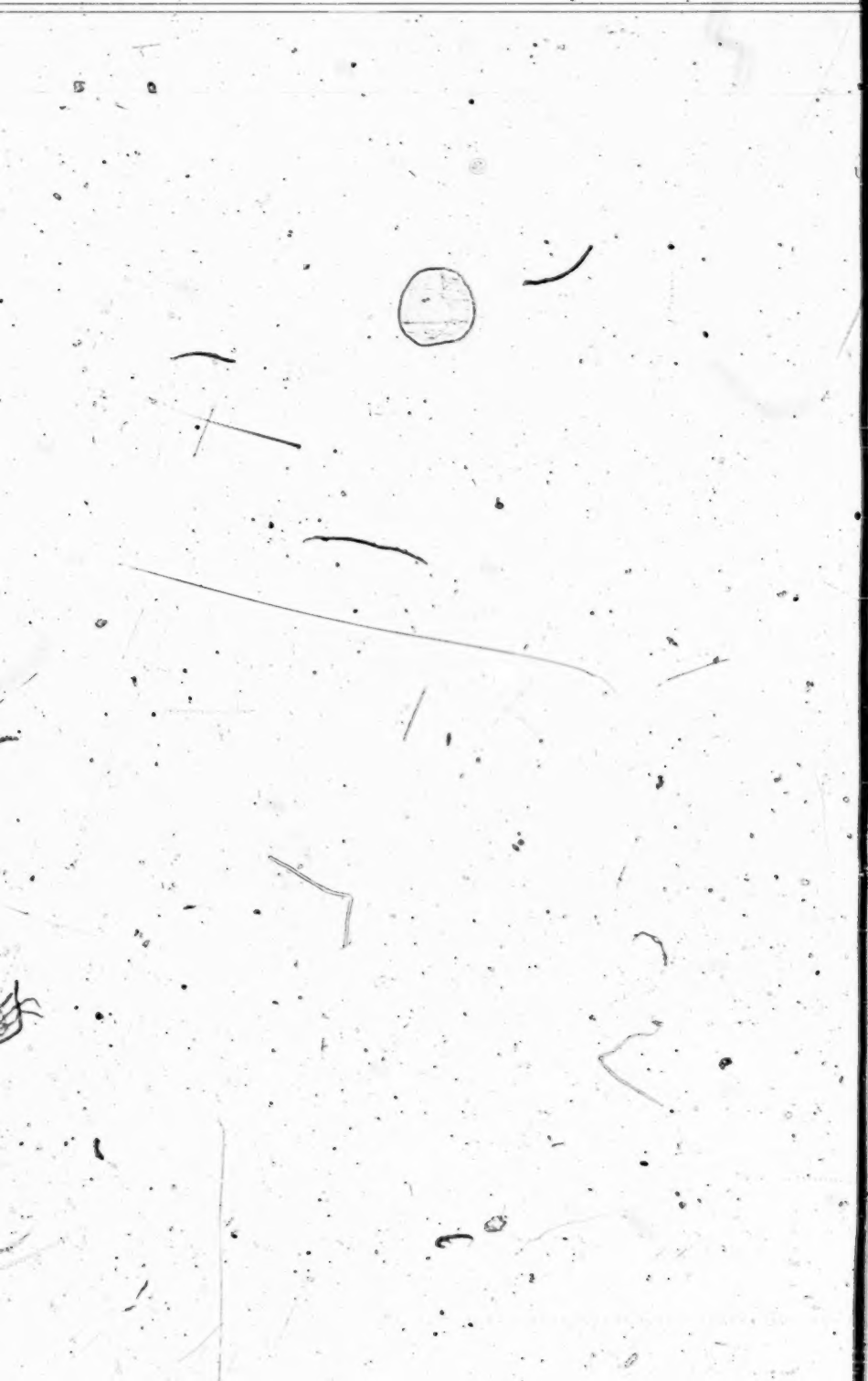

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The Contracting Functions of the Government Are Not Strictly Confined.

The respondents' argument seems to be pitched largely upon the notion that the contracting power of the administrative branch of the Government is restricted to the specific authorization of Congress. This runs counter to the established rule reviewed in *Jessup* v. *U. S.*, 106 U. S. 147.

The report of *U. S.* v. *Maloney*, 4 App. D. C. 505, discloses that the United States had taken a bond to secure the performance of a road construction contract conditioned in part that the contractor "shall be responsible for and pay all liabilities incurred in the work for labor and materials". This was in 1891 and antedated the passage of the Heard Act (1894).

The Miller Act Recognizes the General Powers of Contracting Officers.

The respondents in their discussion of Section 270 a (c) of the Miller Act (Appendix Petitioner's Brief 20, 21), endeavor to read the recognition of a general authority in the contracting officer to require bonds as limited to "a performance bond" (Respondents' Brief pp. 10-11). But that section provides that it shall not be construed as a limitation on "the authority of any contracting officer to require a performance bond or other security *in addition to those*, * * * specified in subsection (a) of this section". *Those* securities which were required in subsection (a) of the same section were " * * * the following bonds * * * (1) a performance bond * * * (2) a payment bond * * * ". Section 270 a (c) also provides that nothing in the section shall be construed to limit the authority of the contracting officer to require such security "in cases other than the cases specified in subsection (a) of this section". The cases specified in subsection (a) are cases of contracts for the construction, alteration or repair of any public building or public work of the United States. Hence it is apparent that Section 270 a (c) is at least a recognition, if not almost a direct authorization to the contracting officer to take bonds of both kinds in cases other than those designated.

The Term "Public Works" Is Not So Limited as the Respondents Contend.

The respondents rely on *United States* v. *Metropolitan Body Co.*, 79 F. (2d) 177, holding that the Miller Act is not applicable to a supply contract for truck bodies. Such contracts are contracts of sale. In such cases the furnishers of material and labor may apparently enforce their liens and claims by ordinary judicial process up to the point where title passes to the United States. Such was the case of *United States* v. *Ansonia Brass & Copper Co.*, 218 U. S. 452. But where the vessel, although a chattel, is constructed by the United States as the owner through a contract for this purpose, furnishers of labor and material may sue upon the bond. *Title Guaranty & Trust Co.* v. *Crane Co.*, 219 U. S. 24. This rule has been applied by the executive branch of the Government to contracts for the remaking of mattresses owned by the United States, 38 Opinions of the Attorney General, 424, 418, and is not limited solely to contracts relating to structures affixed to the land.

The respondents place some reliance on discussion and statements before the Committee of the House of Representatives in its hearing on the Miller Act and eight other bills directed to accomplish the same purpose. The most notable characteristic of the hearing is a tender regard for the interests of persons furnishing labor and material. The discussion in its entirety (R. 34-91) is so general as to be of little help, although it is interesting to note that the bill was reported out on June 19, 1935 (R. 91) which was about a month before the decision in *Maiatico Construction Co.* v. *U. S.*, *supra*, where the Court said:

> "But there is a singular lack of authority defining the phrase 'public works'." 65 App. D. C. 64, 79 F. (2d) 420.

The use of this phrase in the National Industrial Recovery Act, Title 40 U. S. C. A. 402 (Petitioner's Brief Appendix 23), two years before the decision in the *Maiatico* case, is wholly inconsistent with the interpretation given it there.

The Action Is Maintainable by a Third Party Beneficiary.

Respondents' argument that *Bruckner-Mitchell* v. *Sun Indemnity Co.*, 65 App. D. C. 178, 82 F. (2d) 434, would not permit the maintenance of an action on this bond as upon a private obligation is entirely superficial. The argument is based on the earlier procedural distinction between law and equity. Recovery by materialmen was authorized in the *Bruckner-Mitchell* case which was a proceeding in equity, the court pointing out that the common law rule would not permit such a suit on the law side. The adoption of the new Federal Rules after the decision of the *Bruckner-Mitchell* case eliminates the procedural distinction, and the rights of a claimant on such a bond as this may be enforced on equitable principles in a civil action, and the action may be maintained in the claimant's own name. *District of Columbia, etc.* v. *United States Casualty Co.*, 65 App. D. C. 195, 82 F. (2d) 451.

Respectfully submitted,

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BRIEF FOR RESPONDENTS.

STATEMENT OF THE CASE.

This matter is before this Court on a petition for a writ of certiorari granted to review a decision of the United States Court of Appeals for the District of Columbia holding that a materialman to a subcontractor could not sue on a "*payment bond*" required to be given to the United States by the prime contractor pursuant to the interpretation of the Miller Act (40 U.S.C.A. 270a) by the Secretary of the Interior acting as Federal Emergency Administrator of Public Works for materials furnished to a subcontractor

for the construction by the United States of a privately owned library building at Howard University in the District of Columbia.

The opinion of the District Court (R. 6) is not reported. The opinion of the Court of Appeals is reported in 172 F. (2d) 73.

The petition praying for the issuance of the writ was based on three grounds, to-wit:

I. Conflict with a decision of the Sixth Circuit Court of Appeals: (*Peterson* v. *United States*, 119 F. (2d) 145.)

II. Conflict with a decision of this Court. (*Perkins* v. *Lukens Steel Co.*, 310 U. S. 113), and

III. That the Court below failed to give recognition to the necessarily inherent power of an administrative officer to make provisions in a public contract for payment to laborers and materialmen, as a proper incident of the authority to contract, without regard to express statutory direction.

The crux of the case concerned the authority of the administrative officer to require of the contractors a "*payment bond*" for the protection of materialmen furnishing materials to a subcontractor for use in the prosecution of the work under the contract, from funds appropriated by the Congress for the construction of a library building on privately owned lands of a corporation for uses which, although for the benefit of a small portion of the public, are not even remotely connected with any "public building or public work of the United States" within the meaning of the Miller Act (40 U.S.C.A. 270a), or other Act of Congress having to do with the spending of public money for the public good.

REPLY TO POINTS RAISED IN PETITION:

I. There is no conflict with the decision of the Sixth Circuit Court of Appeals.

In *Peterson* v. *United States*, 119 F. (2d) 145, the Circuit Court of Appeals held that the railroad company tunnel and other work under the contract were constructed as *an incident to* a public work of the United States, and did not hold the tunnel itself to be a public work. The Court held that the improvement of a navigable river was a public work of the United States, and that the relocation of the railroad's private tracks and the necessity to construct a tunnel in so doing was primarily to facilitate the improvement of the stream, not to benefit the railroad company. The Court in its opinion at page 147, said:

> Here the contemplated improvement was one to facilitate and control the flow of water in the streams, and was an undertaking for the benefit of the public at large. The enterprise was public in its nature and the work in no respect inured to the benefit of the railroad company. It had its road-bed and its tracks, and but for the impounding of the waters, could have continued their use. The relocation of the railroad was but an incident to the principal objects for which the work was being done, to-wit, flood control and navigation. *Chattanooga & Tennessee Co.* v. *United States*, (6 C.C.), 209 Fed. 28.

and again at page 147 of its opinion, the Court said:

> It is settled law that the United States may enter into contracts for the improvement of navigation and as an incident thereto may provide for the removal and relocation of public utilities interfering with such improvement. *Brown* v. *United States*, 263 U. S. 78, 82, 44 S. Ct. 92, 68 L. Ed. 171.

It was the removal of the railroad's tracks from the stream that was the public benefit in the *Peterson* case, not the construction of the tunnel and relocation of the tracks

on private ground, and that is made clear by the Court's opinion. Indeed, the Court distinguished the railroad company's tunnel from the Howard University dormitories of the *Maiatico Construction Co. case* (65 App. D. C. 62, 79 F. (2d) 418) on this very ground, saying:

> The case of Maiatico Construction Co. v. U. S. * * * also relied upon by appellants, has no application. In that case the United States contracted for the erection of three dormitory buildings of the Howard University, a private corporation. The Government had no title or interest in the property and the school was not for public use, although it may have been remotely for public benefit.

Thus the Court of Appeals of the District of Columbia in following the *Maiatico* case herein as to what constitutes a public building or public work of the United States, is not in conflict with the holding of the Court of Appeals for the Sixth Circuit; and the asserted ground for seeking a review of the decision below in the instant case because of conflict of opinion with another Circuit Court of Appeals vanishes completely.

II. The opinion below does not conflict with this Court's decision in the case of Perkins v. Lukens Steel Company, 310 U. S. 113.

Respondents find nothing in the decision of this Court in the *Perkins* v. *Lukens* case that applies to any question raised by petitioner herein, or that applies to the jurisdiction of the Court below to hear and decide the special appeal brought there by respondents from the refusal of the District Court to dismiss the original action upon respondent's motion. In the *Lukens* case the District Court of Appeals had issued a sweeping injunction against important Government officers forbidding them to require government contractors to pay minimum rates of wages as established by the Secretary of Labor under an act of Congress the meaning of which was challenged in the suit; but this injunction

was not restricted to the parties who had appeared in the case as complainants, and this Court found that said parties had no standing to represent the entire steel industry. This Court did not hold that the action of the Secretary of Labor in making determination of wage rates in various localities for carrying into effect an Act of Congress could not be reviewed by the United States Courts in a proper action; and there is nothing in the opinion indicating that the Secretary had any such immunity from judicial process as is asserted by petitioner in its brief herein. The action failed for lack of sufficient interest in the parties who brought it—not for want of jurisdiction of the defendant or the subject matter.

As was said by the Court of Appeals in its opinion below with respect to petitioner's argument that the *Lukens* case controlled the proposition that the action of the Secretary is not subject to judicial review (R. 136-137):

> There is nothing in the Miller Act which in any sense parallels the situation which existed in the Lukens case and there is nothing in our view, in the opinion in the Lukens case which has any relation to the question in the present case. In this action appellee sought to obtain a right under a bond executed pursuant to a statute of the United States. If, as we hold, no authority was granted the Secretary to require such a bond, there is certainly nothing in the Lukens case which destroys the right of a person sued on a bond to make that defense.

The underlying authority of the Secretary of Labor was not challenged in the *Lukens* case. Only the correctness of her determination was challenged, and for this she was responsible to the Congress the opinion says; but as the mistake, if any, had not directly injured any of the complainants, the Court held that they had no standing to enforce the duty of the Secretary of Labor to Congress or to the industry as a whole. This decision falls far short of holding that the Secretary's duty to interpret the statute correctly is not enforceable in the courts at the instance of a proper party in interest.

Respondents here have not attempted to interfere with the Federal Administrator for Public Works in the performance of his duty prescribed by an Act of Congress, but Respondents do challenge the validity of the "payment bond" sued upon as not having been authorized by any Act of Congress and because, under the laws of the District of Columbia, it is unenforcible against respondents in a suit by a third person not named in the bond.

III. The Court below properly refused to be bound by the unauthorized and erroneous interpretation of the Miller Act by the Administrator of Public Works who has no power, inherent or otherwise, to require the giving of a Miller Act "payment bond" or any other bond for the protection of laborers and materialmen except in connection with a contract for the construction of a public building or public work of the United States within the meaning and intent of said Miller Act.

The Court below, following its prior decision in the *Maiatico* case, held (R. 135) that the "Secretary overlooked the fact that Howard University is a private corporation and accordingly required a bond under the Miller Act. In this respect he was clearly in error."

The record shows that, pursuant to the authority of the National Industrial Recovery Act approved June 16, 1933, 48 Stat. 201, 40 U.S.C.A. 402, the Administrator of Public Works issued regulations designated as "Bulletin No. 51," containing instructions to contracting officers which related to the execution of Federal contracts. (R. 27.) Under Sec. 2(a) of this Bulletin No. 51 contracting officers were required on Federal projects to demand of contractors a performance bond on standard form No. 25, and a payment bond on standard form 25A. By Sec. 5 of this Bulletin No. 51, (R. 28) it was provided that "the contracting officer must, when required by statute, or in the absence of statute may, in his discretion, require either or both of said bonds."

In the Government's bid data furnished to prospective bidders the proposed specifications, which later became part of the contract, by Par. G-12, (R. 29-30) specifically required the furnishing both of a performance *and a payment bond* as required by the Act of Congress approved August 24, 1935, and added: "(See Public No. 321—74th Congress—H. R. 8519 attached to and made part of these specifications.)" But the statute (Miller Act) does not go so far.

Petitioner in effect contends that the Administrator of Public Works by regulations may extend and enlarge the requirements of the Miller Act and require a "payment bond" on a contract for the construction of a building not a public building of the United States and that the Courts are powerless to declare such regulations a nullity even when it is apparent that the regulations have the effect of enlarging the requirements of a statute to the detriment of those contracting in reliance upon the common law.

The only statutory authority for the giving of a "*payment bond*" is found in the Miller Act. This Act, however, only requires such a payment bond in connection with a contract for the construction, alteration and repair of a "*public building or public work of the United States.*" And only in the Miller Act is provision made that the payment bond shall be for the protection of laborers and materialmen performing work or supplying materials in connection with the contract.

Therefore, unless this Court holds that executive officers of the Government have the power and authority to enlarge and add to the specific and clear requirements of a statute in contravention of the common law, as petitioner has asked this Court to do in this case, petitioner's point III passes from the case.

It is well settled that the United States Courts may review the actions of Government Officials where it is alleged that they have acted beyond their powers. *Bates & Guild Co.* v. *Payne*, 194 U. S. 106; *Dismuke* v. *United States*, 297 U. S. 167; *Southern Pacific Ry.* v. *Interstate Commerce*

Commission, 219 U. S. 433; *Skinner & Eddy Body Co.* v. *United States*, 249 U. S. 557.

The case of *Perkins* v. *Lukens Steel Co.*, cited and relied upon by petitioner, does not change the law in this respect; it goes only to the standing of the persons seeking to restrain a public official, and because such persons cannot use the courts for that purpose in the absence of any invasion of their private rights, it does not follow that the *ultra vires* acts of administrative officials cannot be challenged in a proper case by persons whose private rights are prejudiced thereby.

If, as asserted by Petitioner, the Miller Act or the National Industrial Recovery Act gave the Secretary of the Interior acting as Federal Emergency Administrator of Public Works the authority to determine in the first instance whether a project is or is not a public building or a public work of the United States, and to make rules and regulations governing the determination of this question by him, or his subordinates, any determination of this question so made clearly is reviewable by the Courts; and when the Secretary, acting as Administrator of Public Works, promulgated regulations which required a Miller Act payment bond on contracts for construction of a privately owned building, not a public building or public work of the United States, he erroneously construed the requirements of the Miller Act and his authority to require such a bond thereunder, and the Court below properly refused to follow his error.

If officials of the Government Departments entertain erroneous views of their powers and of the construction to be placed upon an act of Congress, their decisions cannot make it the duty of the Courts to perpetuate the error, and override the statute and deprive individuals of their contract rights. *Roxford Knitting Co.* v. *Moore & Tierney*, 265 Fed. 177, 190 (2 C. C. A.) petition for certiorari denied, 253 U. S. 498.

In *Sanford's Estate* v. *Commissioner*, 308 U. S. 39, 52, this Court said:

But Courts are not bound to accept administrative construction of a statute regardless of consequences even when disclosed in the form of rulings.

An administrative ruling, promulgated under a statute authorizing an administrative officer or board to prescribe rules and regulations for its administration which operate to create a rule out of harmony with the statute, is a nullity. *Manhattan General Equipment Co.* v. *Commissioner*, 297 U. S. 129; *Helvering* v. *Safe Deposit and Trust Co.*, 95 Fed. (2d) 806.

A department or bureau cannot adopt arbitrary and unreasonable regulations to supply omissions in a statute. *Santa Monica Mountain Park Co.* v. *United States*, 99 F. (2d) 450, certiorari dismissed, 306 U. S. 666.

In *Newberger* v. *Commissioner*, 311 U. S. 83, this Court said:

> Under different circumstances great weight has been attached to administrative practice and Treasury rulings, but beyond question they cannot narrow the scope of a statute when Congress plainly has intended otherwise. *Rasquin* v. *Humphreys*, 308 U. S. 54; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294.

If regulations cannot narrow the scope of a statute, *a fortiori* the regulations cannot enlarge the statute thereby creating law in derogation of common rights. *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599.

It would seem plain that, when the Federal Administrator of Public Works, by his Bulletin No. 31 and the provisions of the specifications of the construction contract issued under his direction and approval, required that Respondent, the contractor, furnish a "payment bond" under the Miller Act, in connection with the contract for a library at Howard University, he was in error and his action is void as held by the Court below.

Petitioner in effect contends that the Miller Act is mandatory and compels contracting officers to require a payment bond to secure laborers and materialmen whenever

such contracting officer signs a contract on behalf of the United States irrespective as to whether such contract relates in fact to a public building or a public work of the United States, or relates to a building constructed by the United States for a private corporation on private property. For support of this contention, petitioner cites Sec. 1(c) of the Miller Act, U. S. C. A. Title 40, Sec. 270(c), as authority. This subsection reads:

> Nothing in this section shall be construed to limit the authority of any contracting officer to require a *performance bond* or other security in addition to those or in cases other than the cases specified in subsection (a) of this section. (Emphasis supplied)

It will be observed that the quoted subsection only mentions a "*performance bond*" and is completely silent respecting a *payment bond*. The language is perfectly clear. If there were room for any ambiguity the hearings before the Judiciary Committee when it was considering the various bills leading to the enactment of the Miller Act completely dispose of petitioner's contention.

When Mr. Laws, Chief of the Legal Section, Procurement Division, Treasury Department, appeared before the Committee in support of that Department's proposed draft of a bill (R. 76) his suggested bill included the following comparable provision:

> Sec. 3(a) The head of the department or bureau having charge of the work may, in his discretion, require a performance or payment bond in cases other than those specified in section 1 hereof. (R. 84)

When asked by a Committee Member the purpose of this proposed section Mr. Laws said:

> I think that that merely means this, to give you an example: Suppose that we had a $1,000 contract that we thought ought to be bonded. This would authorize the head of the department to require a bond. That is about the only case I can think of. There might be other cases that would be covered by that, but offhand none occurs to me. (R. 84)

When H. R. 8519 was reported favorably by the Judiciary Committee (R. 91, *et seq.*) and finally enacted and approved on August 24, 1935, the "payment bond" provision suggested by the Treasury Department was entirely omitted from subsection (c) of Section 1 of the Act. From this it appears that the failure of the Congress to include the provision suggested by the Treasury Department in its proposed bill was deliberate. It may be added that the hearings show no case in which a payment bond might be desirable other than as provided in Section 1 of the Miller Act.

The language of Subsection (c) of the Miller Act applies only to the provisions of the Act as to *performance bonds*, and was apparently inserted to avoid any implication that a contracting officer had no authority to require bonds or other security on contracts for less than $2,000, and to avoid a contention that the heretofore unwritten power of public officials to exact a *performance bond* or security in favor of the United States had been repealed.

In short, respondents maintain that all that Congress intended by the adoption of subsection (c) of Sec. 1 was to make it clear that contracting officers were not to be deprived of their existing authority to require a *performance bond* to guarantee the performance of the contract where the amount of the contract was in an amount less than $2,000.

RESPONDENTS' REPLY TO PETITIONER'S BRIEF.

I. The library building at Howard University is a privately owned building and the construction thereof by the United States was not a public work of the United States within the meaning of the Miller Act.

Under the facts of this case petitioner does not claim that the library building constructed by the Government under its contract with respondent, Irwin & Leighton, is a "public building of the United States", but apparently bases its argument on the proposition that the construction of the building was a public *work* of the United States. This is a misinterpretation of the language of the statute (Miller Act, 40 U. S. C. A. 270a) and of the decisions of this Court as to what constitutes a "public work".

"Public work", as this term is used in the statute, is of the same genus as "Public building" and relates to the structure itself as distinguished from the functions of "construction, alteration and repair" to be performed under the contract.

The Miller Act did not in any manner change the intent and purpose of the Heard Act, but was passed to clarify the meaning of and simplify the procedure required by the Heard Act. In the place of the dual bond required by the Heard Act, the Miller Act provides for two separate bonds, *i.e.*, a performance bond payable to the United States to secure the performance of the contract, and a payment bond also payable to the United States to secure laborers and materialmen, thereby accomplishing the same purposes of the Heard Act. (See Committee Report on Bill, R. 91-95)

The Miller Act provides that before any contract exceeding $2,000 in amount, for the construction, alteration and repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States (1) a performance bond to secure the execution of the contract and for the protection of the United States, and (2) a payment bond for the protection

of all persons supplying labor and materials in the prosecution of the work.

Under the Heard Act, repealed by the Miller Act, the statute failed to use the qualifying words "of the United States", but following this Court's interpretation of public buildings and public works to mean public buildings and public works of the United States, the Miller Act specifically limited its application to "public building and public work *of the United States*".

There is no basis in the language of the statute authorizing the taking of a "payment bond" for drawing any distinction whatsoever between a "public building" and a "public work" in determining whether either is or is not within the meaning of the modifying phrase "of the United States" as these words are used in paragraph (a) of Section 1 of the Miller Act. And the library building erected on the private property of Howard University is certainly not a structure belonging to the United States so as to constitute a "public building of the United States" as this language has been interpreted by the Courts of the United States. *United States* v. *Metropolitan Body Co.*, 79 F. (2d) 177; *Title Guarantee & Trust Co.* v. *Crane*, 219 U. S. 24; *United States* v. *Ansonia Brass, etc. Co.*, 218 U. S. 452, 470, 474; *Maiatico Construction Co.* v. *United States*, 79 F. (2d) 418; *Peterson* v. *United States*, 119 F. (2d) 145.

There is no valid reason for extending the authority of the contracting officer to require a payment bond for the protection of laborers and materialmen under contract for the construction of buildings on privately owned lands because these private building operations are already fully protected by the mechanics lien laws of the District of Columbia and the States.

It must be presumed that Congress was fully cognizant of the decisions of the Courts long recognizing the distinction between public and private construction as it effects the lien laws, and it is proper to assume that Congress appreciated this legal distinction and phrased the Miller Act in accordance therewith to exclude private construction.

(A). FACTS SUPPORTING THE DECISION BELOW THAT THIS IS NOT A PUBLIC WORK.

By Act approved February 14, 1931, 46 Stat. 115, Congress authorized the construction at Howard University of a library building to cost not more than $800,000 of which sum $400,000 was made immediately available. A portion of the sums made available by this Act where used for architectural fees, (R. 116). Soon after the enactment of the National Industrial Recovery Act, approved June 16, 1933, 48 Stat. 201, 40 U. S. C. A. 402, the original appropriation made available by the Act of Feb. 14, 1931, was impounded (R. 114). Thereupon, the Administrator of Public Works (the Secretary of the Interior), with the approval of the President, made an allocation of funds for the construction of the library building, heretofore authorized by the Congress, presumably under a section of the Recovery Act authorizing "(c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interest of the general public." (40 U. S. C. A. Sec. 402, c) (R. 97, 99)

The plans and specifications to serve the needs of the University were prepared by an architect of its choice and when presented to the Secretary of the Interior acting as Administrator of Public Works and approved by that official; he approved the will of the University. (R. 117) Invitations were issued by the Interior Department for bids. The bid data stated, as did Public Works Administration Bulletin No. 51, part of the bid data, that the successful bidder would be required to execute a performance bond and a *payment bond* as required by Public Act No. 321, 74th Congress, approved August 24, 1935, the Miller Act. (R. 98, 27, 28) A copy of H. R. 8519, the Miller Act, was annexed to and made part of the specifications. (R. 30)

Irwin & Leighton, one of the respondents herein, being the low bidder, entered into a contract with the United States, represented by the Assistant Secretary of the Interior as contracting officer, and, as called for by the bid

data and Bulletin No. 51, on forms supplied to the contractors by the Interior Department, they furnished a performance bond and a payment bond pursuant to the provisions of the Miller Act. (R. 20, 21, 22)

A premium of 1% of the contract price was paid for the performance bond (R. 23) but from the record it does not appear what, if any, premium was paid for the payment bond. (R. 21)

The National Industrial Recovery Act contained no provision for any bond to secure faithful performance of any of the contracts made pursuant to its provisions.

When petitioner filed its suit below it was brought in the name of the United States for its use and benefit and was expressly based upon the Miller Act. (R. 1) Defendant below moved the dismissal of the action on the ground that the library building on the campus of Howard University was not a public building or public work of the United States. (R. 3) This motion was denied and a special appeal was granted by the Court of Appeals of the District of Columbia, who, after hearing, reversed the judgment of the District Court.

The evidence is uncontradicted that Howard University is a private corporation (R. 106) organized by Act of Congress approved March 2, 1867, 14 Stat. 438. Its charter gives it all rights and powers usually vested in private corporations, including the right to purchase and sell real estate, and the right to contract and to sue and be sued. (R. 123) The University is controlled by a Board of Trustees and for the past 70 years has owned in fee its campus upon which was erected the library building in suit and has never consented to the transfer to the United States of this land. (R. 111, 112)

Funds for the maintenance and operation of the University are derived from private sources by donations from individuals and private educational foundations as well as from tuition from its students. (R. 108) It has an endowment secured from private sources the interest from which is expendable. (R. 108, 114). Annual appropriations have been made by Congress for the University, these Federal

contributions amounting to approximately $600,000.00 per year. (R. 112)

The facts in this case are identical to those presented in the case of *Maiatico Construction Co. v. United States*, 63 App. D. C. [illegible] 9 F. (2d) 418, cert. denied 296 U. S. 649. The only difference is that in the cited case the action involved the Heard Act, 40 U. S. C. A. 270, whereas this action involves the Miller Act, 40 U. S. C. A. 270a.

In sustaining its decision in the *Maiatico case, supra*, the lower Court pointed out that the main purpose of the Miller Act was to relieve certain procedural trouble found in the existing law and to shorten the period when under that act suit might be instituted against the surety. This is amply sustained by the hearings before the Judiciary Committee when it was considering the bills which became the Miller Act. (R. 33 to 95)

(B) CASES SUPPORTING THE DECISION BELOW THAT THIS IS NOT A PUBLIC WORK.

Respondents contentions are that the generosity of the Federal Government in providing funds to construct a building for Howard University did not *per se* change Howard University from a private corporation into a public institution of the United States. The library building erected upon the private property of the University under contract entered into by the United States became nevertheless the private property of the University and was not at any time a public building or public work of the United States.

Accordingly, a payment bond taken for the protection of laborers and materialmen under the Miller act, applying exclusively to the construction of public buildings and public works *of the United States*, cannot serve to sustain petitioner's claim for materials supplied to a privately owned building. *United States* v. *Faircloth*, 49 App. D. C. 323, 265 Fed. 963; *United States* v. *Empire State Surety Co.*, 114 App. Div. 755, 100 N. Y. Sup. 247; *Penn Iron Co.* v. *Trigg*, 106 Va. 557, 56 S. E. 329. *Maiatico* v. *United States*, *supra*; *Peterson* v. *United States*, 119 F. (2d) 145. To the same

effect is the recent case of *United States* v. *Metropolitan Body Co.*, 79 F. (2d) 177, wherein it was said that mail truck bodies, which during construction, remained at risk of contractor and did not become property of the United States until completed, delivered and accepted by the Government, were not "public work" within the statute requiring contractor for public work of the United States to furnish bond for payment to materialmen. These cases are sustained by decisions of this Court.

In *Title Guaranty & Trust Co.* v. *Crane*, 219 U. S. 24, 31, the question arose as to whether a vessel being constructed under contract for the United States was a public work of the United States within the meaning of the Heard Act. The contract provided that as partial payments were made those portions of the vessel as were paid for were to pass to the United States. Under the Heard Act a bond was required in connection with every contract for the contraction, alteration or repair of a public building or public work but that Act did not, as does the Miller Act, refer to these buildings or works as "public buildings or public works *of the United States.*" In interpreting the Heard Act, Mr. Justice Holmes stated that if the steam vessel was not a public work *of the United States* no action could be maintained on a bond given to secure laborers and materialmen under the Heard Act.

In *United States* v. *Ansonia Brass, etc. Co.*, 218 U. S. 452, 470, 474, this Court held with respect to vessels that did not pass to the United States in part as partial payments were made to the contractor, and such vessels only became the property of the United States when completed and accepted, that the lien laws of Virginia applied and no right to materialmen accrued under a bond given pursuant to the Heard Act.

In view of these decisions it is difficult for Respondents to follow Petitioner's argument that the Library Building at Howard University could in any sense be considered a public building or public work of the United States within the meaning of the Miller Act.

(C) PETITIONER'S ARGUMENT DOES NOT SUPPORT ITS CONTENTION THAT THIS IS A PUBLIC WORK.

Petitioner argues that because the National Industrial Recovery Act authorized the construction of Public Works that any work undertaken pursuant to the Act became public works of the United States.

In passing upon this contention the Court below tersely said: "* * * this does not follow" (R. 134). As pointed out by the Court below, the National Industrial Recovery Act provided for public works of states, municipalities, political subdivisions of states, public agencies of states, public corporations, boards and commissions and private corporations engaged in constructing bridges, tunnels, docks, viaducts, water works, canals and markets devoted to public use and self-liquidating in character. As a result of this the United States have loaned money to municipalities to build electric light plants and water works and the administrator has supervised the contracts for carrying them out. These projects may be public works in the sense that they are intended to benefit the general public using them, but it is self-evident that they are not *public works of the United States* in fact or in law, and there is nothing in the National Industrial Recovery Act to indicate that Congress intended to change the well established status of such works.

Respondents submit that Congress cannot by fiat make that which is not a public building or public work of the United States into a public building and public work of the United States, when in fact the building, as proven in this case, is a private building and not a public building of the United States. Nor can it authorize executive officers of the Government to do so. As was said by this Court in *Block* v. *Hirsch*, 256 U. S. 135, in upholding the District of Columbia Rents Act:

> No doubt it is true that a legislative declaration of facts that are material only on the grounds for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the Courts,

Citing: *Shoemaker* v. *United States*, 147 U. S. 282, 298; *Hairston* v. *Danville & Western Ry. Co.*, 208 U. S. 598, 606; *Prentice* v. *Atlantic Coast Lines*, 211 U. S. 210, 227; *Producers Transportation Co.* v. *Commission*, 251 U. S. 226, 230.

This rule of law was followed in *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, in which case this Court held the language of the Act declaring that emergencies growing out of the war still existed was not controlling, citing cases to show that "the court may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law".

It follows from this that the erroneous classification of the project for the construction of the library building at Howard University as a Federal Project under regulations prescribed by the Administrator of Public Works, and the consequent requirement that a "payment bond" be given pursuant to the statutory provisions of the Miller Act relating solely to public buildings and public works of the United States, is reviewable in a proper proceeding where the validity of such bond is questioned.

II. The action of the Secretary in demanding a "payment bond" pursuant to the Miller Act, is reviewable by the Courts, and such action can be set aside.

Point II of Petitioner's brief is fully answered in this brief in Respondent's reply to Point III of the petition applying for the writ, at page 6 of this brief.

III. The bond cannot be enforced either within or without the confines of the Miller Act.

Petitioner contends that the "payment bond" is fully enforcible as a private obligation. Respondents urge that the common law of the District of Columbia does not permit suit on a bond for the benefit of one who is neither party or privy thereto in the absence of a statute altering the common law rule.

The Court of Appeals in its opinion (R. 129-137) we believe has sufficiently disposed of petitioner's third argument when it pointed out that a suit in the name of the United States for the benefit of a third party cannot be brought upon a voluntary bond given to secure the performance of a contract with the United States in the absence of a Federal statute which authorizes it, citing: *United States* v. *Faircloth*, 49 App. D. C. 329, 265 Fed. 963; *Penn Iron Co.* v. *Trigg*, 106 Va. 557, writ of error dismissed, 215 U. S. 611.

In *Sun Indemnity Co.* v. *American University*, 26 F. (2d) 556, 557, the Court of Appeals of the District of Columbia said:

> He was not a party to the obligation, and, under the rules of the common law followed by state and federal courts in this country, he cannot maintain an action upon it in his own name.

In that case the Court pointed out that the bond was given to protect the University against liens which might have been filed by laborers and materialmen under the mechanics lien laws of the District of Columbia, and not for the protection of the claimant.

In *Maiatico Construction Co.* v. *United States*, 79 F. (2d) 417, 424, the same Court on this same point said:

> The same result follows if it be considered a common law bond; for at common law an obligation to which one is neither party nor privy furnishes no protection.

Hence, whatever inherent power there may have been in the Secretary of the Interior acting as Federal Administrator of Public Works to require a bond necessary to protect the *United States*, in the absence of express statutory authority, this power does not exend to the protection of *third parties* not named in the bond, and such parties cannot maintain a suit upon such a bond in the District of Columbia.

In support of its specification of error on the part of the Court below in denying its right of recovery upon the bond

as a private obligation for the benefit of third parties, petitioner cites *Bruckner-Mitchell* v. *Sun Indemnity Co.*, 65 App. D. C. 178, 82 F. (2d) 434, as authority for its proposition.

The cited case relates to a contract for the construction of a High School Building, a public building of the District of Columbia. Under a statute (Act Feb. 28, 1889, 30 Stat. 906, as amended by Act. Sept. 1, 1916, 39 Stat. 688, D. C. Code, 1929, Title 20, Sec. 47) comparable to the Heard Act applicable to public buildings of the United States, a bond was required to secure the payment of laborers and materialmen in the construction of public buildings for the District of Columbia. The surety tendered by the contractor was not entirely satisfactory to the Commissioners of the District of Columbia, who required the first surety to furnish agreements of other sureties guaranteeing to indemnify the District of Columbia against the failure of the first surety to carry out its obligations under the bond within certain limitations. In order to comply with the requirements of the Commissioners, the first surety secured from several other surety companies, re-insurance agreements in favor of the District of Columbia, whereby they guaranteed, within the limitations of their respective agreements, to make good to the District of Columbia such amounts as the first surety would be in default, it being the intention of the re-insurance agreements, "to guarantee and indemnify the District of Columbia against loss under said bond" furnished by the contractor and executed by the first surety, and, containing the further covenant that in case of default on its bond the said re-insurer may be sued by the District of Columbia for the amount of the re-insurance or whatever the amount of the default may be less than said amount.

In addition to the re-insurance agreements between the first surety and its re-insurers, the first surety delivered to the District of Columbia separate contracts under seal with each of the other sureties, in terms identical with the re-insurance agreement between the sureties for the respective amounts of re-insurance paid for, agreeing that they might

be sued on the bond. After the delivery of the re-insurance agreements to the District of Columbia, the first surety procured from the same re-insurers additional re-insurance agreements under seal on a form called "Standard Form of Re-insurance Agreement", identical in all respects to the original re-insurance agreements, to which was attached as part thereof a copy of the original bond to the District of Columbia, signed by the first surety, which bond provided, as required by the statute under which it was given, for payment of laborers and materialmen.

Thereupon, the original bond signed by the first surety was approved by the owners, the Commissioners of the District of Columbia.

During the prosecution of the contract the first surety failed. A subcontractor brought suit in equity in its own name under the bond and re-insurance agreements, against the signers thereof to recover the balance claimed due.

In allowing recovery the court said: "* * * it is true that materialmen are not named parties in the insurance agreements and cannot *at common law* sue thereon as parties"; but the Court distinguished the case on the facts as permitting recovery where *the bond was given pursuant to a statute* and the re-insurance agreements provided for liability to a third party beneficiary as set forth in the bond, thus affording an *equitable* basis for the suits on the *agreements*.

Thus in the *Bruckner-Mitchell case*, the Court sustains our view that in the absence of a statute a materialman cannot sue on a bond given to protect the owner in the performance of the contract, notwithstanding the condition thereof that the contractor "shall make payment to all persons supplying labor and materials in the prosecution of the work contemplated by the contract." (82 F. (2d) 434, 445)

And the Court in this case affirmed its previously stated views in the case of *Sun Indemnity of N. Y. v. American University*, 58 App. D. C. 184, 26 F. (2d) 556, saying that "said case is not contrary in its implications from the conclusions we reach."

Furthermore, in the *Bruckner-Mitchell case* the Court stated that the views therein were not contrary to its decision in the *Maiatico case, supra,* saying: "There the Secretary of the Interior who exacted a bond for the United States in the performance of a contract of construction of buildings for Howard University, had no authority whatever to exact a bond because the buildings in question were not public buildings."

IV. Petitioner's Criticisms of the Decision Below.

On pages 13 and 16 of petitioner's brief, references are made to the memorandum opinion of the Solicitor of the Department of the Interior to the Assistant Secretary dated March 13, 1940, (R. 23-25) containing his opinion that the Howard University Library Building is a public work within the meaning of the Miller Act. The Court's attention is invited to the fact that when this memorandum opinion was offered in evidence objection to its admissability was promptly made and subscribed thereon on the ground that the exhibit was an inter-departmental communication and not binding on the defendants below. (R. 23)

Also it is noted that the contract for the library building for Howard University involved in this suit was entered into on December 5, 1936, (R. 12) and that the *Maiatico case, supra,* was decided and became final by this Court's denial of a writ of *certiorari* on December 9, 1935, (296 U. S. 649). Yet on March 13, 1940, the Solicitor attempted to justify the Secretary's action more than three years earlier in demanding a payment bond. Obviously this opinion of the Solicitor, even if admissible in evidence in this case, could not have influenced the Secretary's action when it was taken in 1935, and this exhibit should be disregarded by the Court.

Petitioner argues at p. 12 and 17 of its brief that the mechanics lien statute of the District of Columbia, Title 38, Secs. 101-120, District of Columbia Code, 1940, 31 Stat. 1384, are inoperative because the mechanics lien statutes only provide a recourse against funds in the hands of the

owner; that respondents contend that the United States is not the owner, and it follows, they state, that there never were and never would be any funds in the hands of the owner subject to the operation of the lien statute.

That argument completely ignores the very wording of the mechanics lien statutes which makes them applicable to the owner or the agent of the owner. Congress authorized the Secretary of the Interior to enter into the contract for the construction of the building well knowing that Howard University was the legal owner of the land upon which the building was to be erected. For the purposes of the lien statutes the head of the department, if not the United States itself, became the agent of the owners in the transaction. The University, as we have previously shown, knew its requirements and drafted its plans and specifications to suit its needs, and when these drawings and specifications were accepted and approved by the Secretary of the Interior, the Assistant Secretary, as contracting officer, approved the will of the University and became the agent of the University in the construction of the building. All of petitioner's rights asserted here could have been preserved had it proceeded under the lien laws of the District of Columbia. Had it followed the requirements of the local lien laws and given notice to the Secretary of the Interior, or to the contracting officer, the Assistant Secretary of the Interior, of its intention to claim a lien under the laws of the District of Columbia, there is no legal reason why the officials representing the United States and Howard University should not have withheld from the contractors funds sufficient to pay its claim. And, under such proper notice, respondents could have also protected themselves with regard to the debts due by one of their subcontractors to a materialman. (R. 2)

The cases cited by petitioner on p. 12 have no bearing on the issue.

CONCLUSION.

The work here involved was not a public work, nor was the building erected under the contract a public building, of the United States within the meaning of the Miller Act; the interpretation placed on the Miller Act by the Secretary was erroneous and the giving of a payment bond thereunder was a nullity; in the absence of statutory provision no suit can be maintained in the District of Columbia by a third party on a bond to which the claimant is not a party or privy; the judgment and decision of the Court below is correct and not in conflict with any prior decision; and the writ issued herein should be recalled and dismissed.

Respectfully submitted,

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March 2, 1942.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 658.

UNITED STATES OF AMERICA, To the Use of NOLAND COMPANY, INCORPORATED, A Corporation, *Petitioner*,

v.

ALEXANDER D. IRWIN AND ARCHIBALD O. LEIGHTON, Trading as IRWIN & LEIGHTON, and UNITED STATES GUARANTEE COMPANY, A Corporation, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

PETITION FOR REHEARING.

PRENTICE E. EDRINGTON,
AMASA M. HOLCOMBE,
Attorneys for Respondents.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

PETITION FOR REHEARING.

Now come respondents and petition the Court to grant a rehearing in the above entitled and numbered cause decided April 6, 1942, to the end that grievous errors in said opinion be corrected, and for grounds for the granting of said rehearing, respondents show:

I. That the Court erred in holding that the words "*public building or public work of the United States*" as specifically used in the Miller Act of August 24, 1935, are equivalent in meaning to "*public works*" as used in the National Industrial Recovery Act of June 16, 1933.

II. That the Court erred in holding that Congress in enacting the National Industrial Recovery Act of June 16, 1933 intended to make a new definition of "public works" for purposes outside of the scope of said Act.

III. That the Court erred in giving any consideration to what the Court termed "the 'strong equities' of petitioner's case," when no basis therefor is found in the record.

WHEREFORE, respondents pray that on the above grounds, as amplified by the appended brief, the opinion rendered herein be vacated and that a rehearing be granted, and for general and equitable relief.

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Attorneys for Respondents.

BRIEF IN SUPPORT OF PETITION FOR REHEARING.

I.

The Court Erred in Holding That the Words "Public Building or Public Work of the United States" as Used in the Miller Act Are Equivalent in Meaning to "Public Works" as Used in the National Industrial Recovery Act.

The decision in this case mutilates principles which have long been regarded as basic law. Few doctrines have been more universally accepted than those recognizing the definition of "a public work of the United States."

This Court in its opinion, after stating the facts and the statutes applicable to this dispute, states the issue as follows:

> "The question before us therefore is whether the construction of the library was a 'public work' as that term is used in the Miller Act."
>
> . . . . . .
>
> "No aid in ascertaining the meaning of 'public work' is to be found in the Miller Act itself. But in the National Industrial Recovery Act, passed two years before the Miller Act, Congress defined it as including 'any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public.'" (Opinion, p. 4.)

In the foregoing statement the Court not only ignored the specific language of the Miller Act, which restricts its scope to public works "of the United States," but the Court also failed to note that the "public works" provided for in the National Industrial Recovery Act include two classes of projects of entirely distinct character, which the Administrator of Public Works respectively termed "Federal Projects" and "Non-Federal Projects" for purposes of administration, and the latter class of which does not include any projects that are in fact public works of the

United States or that have ever been in law considered to be public works of the United States.

The distinction drawn between Federal and Non-Federal projects in the administration of the National Industrial Recovery Act and the character of each, is clear from the following excerpts from the testimony of John J. Madigan, Public Works Administration Official, called by petitioner as a witness:

Direct Examination by Mr. Heron:

"Do you know whether or not this bulletin No. 51, revised October 1, 1935, was promulgated generally among the executive departments of the Government?

"A. It was in connection with Federal projects.

"Q. Can you tell me whether or not the building of the Library building at Howard University was a Federal project or a non-Federal project?

"A. From my point of view this was a project known as a Federal project as contrasted with the non-Federal projects.

"Q. Do I understand that the activity of the Public Works Administration was divided generally into Federal and non-Federal projects?

"A. That is right. (R. p. 101.)

Cross Examination by Mr. Edrington:

"Q. That is your only reason for stating it is a public work of the United States, because Mr. Ickes placed it in that category?

Objection by Mr. Heron: I object. Witness did not say it was a public work of the United States, but a Federal project.

"Q. I correct my question. Your only reason for saying it is a Federal Project is because Mr. Ickes as Administrator of Public Works placed it in that category?

"A. We have two types of projects under the Public Works Administration, non-Federal and Federal, and I know the project to which you refer is not one of those in any of our non-Federal lists.

"Q. Non-Federal projects—what types of projects are they?

"A. All types of projects—buildings of various kinds, sewers, etc.

Q. It includes school houses, court houses etc. in municipalities, cities and states?

"A. Yes. (R. p. 102-103.)

The important thing to be noted in the foregoing testimony is that all of the projects mentioned by witness are "public works" within the scope of the National Industrial Recovery Act, but not all of them are "public works *of the United States*" because many are in fact state and municipal projects not owned by the United States.

Thus it is shown by the record in this case that the term "public works" used in the National Industrial Recovery Act, as interpreted by those charged with the administration of the Act, far transcends the class of projects that can be described as "public works of the United States" and this Court's opinion that the two expressions are synonymous not only does violence to the plain meaning of the definite words of ownership in the Miller Act, but ignores the long line of decisions interpreting the Heard Act as inapplicable to the Miller Act notwithstanding that the restrictive language of the Miller Act so obviously is predicated thereon. *Title Guarantee Co.* v. *Crane Co.*, 219 U. S. 24; 23 Op. Atty. Gen'l 174; *United States* v. *Faircloth*, 49 D. C. App. 323, 265 Fed. 963; *United States* v. *Empire State Surety Co.*, 100 N. Y. Supp. 247; *Penn Iron Co.* v. *Trigg*, 106 Va. 557, 56 S. E. 329; *Maiatico Constructing Co.* v. *United States*, 65 D. C. App. 62, 79 F. (2nd) 418, cert. denied 246 U. S. 649.

Specifically, the question for decision is: By providing explicitly that the bond provisions of the Miller Act shall extend only to "a public building or a public work *of the United States*" has the Congress, following the Courts, withheld the benefits of the Act in classes of "public works" NOT public works *of the United States*.

So far as its language conveys ideas, the Miller Act affords no intimation that Congress intended anything more than this question postulates, and while the words of the statute do not by themselves distil its meaning, the Court

should at least begin with them rather than substitute for them the words of another Act having a much broader purpose and range.

When Congressman Duffy of Ohio at the hearings stated, as remarked by the Court (Op. p. 5): "If this bill is passed by this Congress it would certainly be applicable to the public works program and that is the reason for its importance," he evidently had reference to one of several bills introduced and under consideration, viz: H. R. 2068 (R. 34-35); H. R. 5054 (R. 42-43, et seq.); or H. R. 6115 (R. 48-49-50). The latter two provided:

> "That hereafter any person or persons entering into a formal contract with the United States for the construction of any public work or for repair upon any public building or public work, shall be required . . . to execute the usual penal bond . . . to insure to the benefit of any mechanic, materialman, etc."

Obviously he was advocating those bills which followed the wording of the Heard Act and which did not restrict their provisions for bonds in favor of third parties furnishing labor and material to "public buildings and public works of the United States." If Congress had in fact enacted one of the above cited bills and had failed to restrict the language of the enacted bill as it did in the Miller Act, then this Court might logically hold that it was intended to cover any public work listed and described in the NIRA. But Congress did not adopt any of these all-inclusive bills; but, on the contrary, enacted H. R. 8519 which by its specific wording restricted its provisions to public buildings and public works *of the United States*.

Congress in thus choosing between these bills, thereby restricting the Miller Act to public works "*of the United States*," evidently wanted to avoid any implication that the provisions of the Miller Act were applicable to "public works" generally which otherwise might have arisen because of the more inclusive meaning of "public works" in the NIRA.

II.

The Court Erred in Holding That the Congress in Enacting the National Industrial Recovery Act Intended to Make a New Definition of "Public Works" for Purposes Outside the Scope of Said Act.

In enacting the National Industrial Recovery Act in 1933 the Congress did not incorporate therein a new definition of public works. The main purpose of the Act was to increase employment throughout the States by the construction of public works. Accordingly Congress appropriated $3,300,000,000.00 and listed the types of public works to be constructed which included a comprehensive program of construction of projects, some of which were "Federal" and were *in fact* public works *of the United States* while others were "non-Federal" and did not *in fact* belong to the United States. The public works *of the United States* authorized by that Act and classified by the Administrator of Public Works as "Federal" were described in the Act as (a) construction, repair and improvement of . . . public buildings and any publicly owned instrumentalities or facilities; (b) conservation and development of natural resources such as construction of river and harbor improvements, construction of naval vessels. These and many other Federally owned projects not fully enumerated herein were *in fact public works of the United States.*

Also authorized by said Act and classified by the Administrator of Public Works as "non-Federal" were projects of any character heretofore eligible for loans under subsection (a) of Section 604b, Title 15, U. S. C. That subsection included projects of states, public agencies of states, public corporations, boards and commissions, and private corporations engaged in constructing bridges, tunnels, docks, viaducts, water works and markets devoted to public use and self-liquidating in character. The National Industrial Recovery Act authorized projects carried on by public authority or with public aid to serve the interests of the gen-

eral public, such as the library building involved here. These were all non-Federal public works which did not belong to the United States and were NOT "public works of the United States" giving these words their usual meaning.

Furthermore, the action of the Administrator of Public Works in classifying Howard University Library as a Federal Public Work, and of the Court in considering the Library as a public work *of the United States*, within the meaning of the Miller Act, are in square contravention of the intent of the Congress as actually expressed in the NIRA, Sec. 203(c), 40 U. S. C. A. 403(c) where the clear distinction is made between Federal public works and other non-Federal public works authorized by the NIRA. This last cited Section provides:

> (c) In the acquisition of any land or site for the purposes of Federal Public Buildings and in the construction of such buildings provided for in this chapter, the provisions contained in sections 305 and 306 of the Emergency Relief and Construction Act of 1932, as amended, shall apply.

Sections 305 and 306 of the Emergency Relief and Construction Act (40 U. S. C. A. 258a) provided for a short method of condemnation of lands for the public use of the United States, but they were not invoked in the construction of the Library building on land owned by Howard University notwithstanding the statute prohibiting construction of public buildings of the United States on private property (40 U. S. C. A. Sec. 255).

Therefore, if the Howard University Library were properly classified by the Administrator of Public Works as a Federal Public Work or Building, the Assistant Secretary of the Interior violated the provisions of Section 203(c) of the NIRA in not following the requirements of the Act of 1932 by condemnation of the site before commencement of the work of construction; but obviously the error was not that of the Assistant Secretary of the Interior because the Howard University Library is not a public building of the United States and should not have been so classified.

If, as the Court has erroneously concluded in its opinion, the Congress had intended to include within the scope of the Miller Act passed in 1935 (two years after the enactment of the NIRA) all of the works described in the NIRA it would have necessarily adopted the language of the Heard Act, the provisions of which were applicable to "any public building" or "public work," instead of limiting its provisions to "public buildings and public works *of the United States.*"

Whatever was the intention of Congress in 1933 by the use of the general words "public works" in the NIRA, this intention underwent a distinct change and alteration in 1935, for in the Miller Act the Congress specifically added to the words "any public building or public work" of the Heard Act the restricting words "of the United States." This clearly demonstrates and should be persuasive that Congress in enacting the Miller Act in 1935 did not legislate with regard to public works as that term is generally used in the National Industrial Recovery Act with reference to "Federal" and "non-Federal projects," but was legislating with specific reference to certain public works which were *in fact* public buildings and public works "of the United States."

It is difficult to follow the reasoning of the opinion in pointing out that the Miller Act enlarged the provisions of the Heard Act when, as a matter of fact, the Miller Act restricted its provisions to public works *of the United States.* This specific restriction, viewed in connection with other bills before the committee which followed the language of the old Heard Law, can only be interpreted as meaning that the lawmakers were restricting the scope of the Miller Act to those laborers performing labor on and materialmen supplying material to projects belonging to the United States, and excluding such claimants from the provisions of the Miller Act who worked on or supplied material to "non-Federal" projects, thus setting at rest the uncertainty, if any, concerning the applicability of local lien laws to such non-Federal public works.

Notwithstanding the like views expressed by the Courts in the *Maiatico* and *Peterson* cases to the contrary, we do

not quibble with the Court in holding that the library building at Howard University was a "public work" in that it served the interest of the general public. A Carnegie Library donated to a city may be a public work serving the interest of the general public in that community, but we contend that it is not a public work of the United States. We are confident that this Court could not hold the provisions of the Miller Act applicable to such a library project even in the case where Congress appropriated money in aid of its construction.

It is significant to note that the Court does not anywhere in its opinion hold the library building at Howard University to be a "public work *of the United States.*" Thus it is apparent that the Court has inadvertently overlooked the crux of the case so far as the applicability of the Miller Act is concerned. In holding, as the Court has in its opinion, that the library is a "public work" within the alleged definition contained in the National Industrial Recovery Act, which preceded the Miller Act by two (2) years and is not the latest expression of legislative intent on the issues of this case, the Court has failed to give any import, or even consideration, to the latest intention of the Congress on this subject as clearly expressed in the Miller Act which specifically restricts its provisions to public buildings and public works "*of the United States.*"

In view of the admitted status of Howard University, the Court cannot conscientiously bring itself to hold that said library building is *in fact* a "public building or public work *of the United States.*" To do so would do violence to the well considered and established opinion of this Court and the Attorney General of the United States cited with approval in footnote 7, page 5 of the Court's opinion. There the Court agrees with the correctness of the proposition that title to the building or project or to the land on which it is situated must be in the United States to make the building or project a *public work of the United States.*

For the purpose of deciding this case, as correctly held by the lower Court, the Miller Act adds nothing over the

Heard Act to petitioner's right to recover. If it can maintain its action under the terms of the Miller Act, it could under the same circumstances maintain it under the Heard Act prior to its repeal. In either case, the *sole* question would be whether an action could be maintained on a bond taken by the United States to secure the payment of laborers and materialmen in the construction of a building which was *not* a *public building of the United States* (R. 134). Since this Court by inference concedes that the library is *not a public building of the United States*, the Miller Act by its very terms has no application to it and the Court is unwarranted to go outside of the Miller Act to decide its application to the issues presented here.

The Administrator of Public Works erred in classifying the library building at Howard University as a "Federal project" when it was in fact, as proven herein, not a public building or public work of the United States. Certainly no power exists in the Administrator of Public Works under the National Industrial Recovery Act to change the character of a private building arbitrarily to that of a public building of the United States if it is not so in fact. The specific authority of Congress is required for a Government Official even to accept a donation of private property to the United States, and the seizure of private property is hedged about by conditions which did not exist in the case of the Howard University library building and did not justify its classification as a public building of the United States so long as the title remained in Howard University, a private corporation.

It follows that petitioner has no right of action on the bond unlawfully demanded by the Secretary of the Interior under the regulations prescribed by the Administrator of Public Works for Federal projects under the National Industrial Recovery Act.

To sum up, it will be observed that the Court in its opinion makes no significant difference between "public works" of the National Industrial Recovery Act program encompassing both Federal and non-Federal projects, and a "pub-

lic work *of the United States*" within the meaning of the Miller Act, the language of which restricts the giving of a "payment bond" to public works "of the United States" in conformity with the many decisions of the Court interpreting the scope of the lien laws. The failure of the Court to recognize the difference in scope of these two acts has led it into error.

III.

The Court Erred in Giving Any Consideration to What the Court Terms "'the Strong Equities' of Petitioner's Case", When No Basis Therefor Is Found in the Record.

The record in this case affords no basis for ascertaining what may be the "strong equities" of petitioner's case alluded to on page 6 of the Court's opinion. The premium of $8172.25 is shown to have been paid for the *performance* bond (R. p. 23) which protected the United States against the default of the prime contractor in case of non-performance of the contract. There is nothing in the record to show that any additional premium was paid for the *payment* bond sued on. It is entirely immaterial that respondent, Irwin & Leighton, did not protest against the giving of the bonds required by the Miller Act which were demanded as a condition for the award of the contract, for such protest evidently would not have deterred the Secretary of the Interior in requiring an improper bond in view of the contentions of the Solicitor of the Interior Department expressed as late as 1940 (R. pp. 23-25).

Moreover, the prime contractors, Irwin & Leighton, primarily responsible and liable on the bonds, as principals, are fully able to respond in full and save harmless its guarantor, the surety company, to any judgment obtained against them in a proper suit. This is shown to the Court by original affidavit filed herewith and printed as an Appendix to this brief. Irwin & Leighton hold in their hands to the credit of Cullen, Inc., its subcontractor, on three projects the sum of $13,293.04, a sum insufficient to pay the

obligations of Cullen, Inc. due to its creditors for materials supplied to said three projects totaling $41,832.50. Some of these creditors are protected by surety bonds but a great number of them are not and have resorted to attachments issued by the local courts against the funds in their hands. The rights of some of these creditors of Cullen, Inc. are wholly dependent upon the outcome of this suit because the funds retained are inadequate to pay them all and some of them have no direct right of action against respondents herein.

If the Court is to indulge in presumptions, it is suggested that it would be equally reasonable and fair to presume that respondents, Irwin and Leighton, are attempting to preserve the rights of other claimants as against the inflated claim of petitioner, as for the Court to remark upon respondents' acquiescence in the contracting officer's requirement of a payment bond as supporting a case of "strong equities" favorable to the petitioner. Respondents protest that the opinion in this respect is prejudicial to its reputation for fair dealing and ought to be corrected.

In view of respondent's defenses to the petitioner's claim on its merits, we remark that had this case reached this Court after a full hearing below we feel confident that the record would be convincing that the equities, if any, would be with respondents, Irwin & Leighton. Because respondents chose, prior to trial on the merits, to simplify the proceedings by interposing a seemingly complete legal defense to the right of petitioner to recover, as sustained by the lower Court, should not prejudice the Court in the determination of the narrow legal issues before it.

CONCLUSION.

Respondents submit that this Court's opinion in this case is manifestly so illogical in its results and in its uncertain effect upon the heretofore well established decisions of this Court establishing quite definitely the meaning of "public works of the United States," that to let this decision stand will only add to the confusion and perplexities faced by the very beneficiaries for whom the Congress enacted the Miller Act.

The Miller Act was intended to protect laborers and materialmen only on Federal projects belonging to the United States, who, prior to the Heard Act of 1894, had no recourse, redress or legal means of being secure in their claims. The Miller Act was enacted to supplement and not to conflict with State lien laws.

Inevitably the question will arise as to those having claims against "public works," which are not public works *of the United States* whether they must resort to the Miller Act or to the lien laws of the state for recovery. All precedents relative to the rights of third parties under construction bonds applicable to Federal and non-Federal Public Works are materially affected by this decision and their validity becomes uncertain. Hence its importance to the construction industry as well as to claimants.

The decision below, we submit, is correct and in consonance with the intent and meaning of the bond statute as reenacted by the Congress and with the prior decisions of this and other Courts construing it.

For said reasons, a rehearing should be granted to correct the evident error made by this Court in its failure to sustain the decision of the lower Court and to forestall an inevitable series of appeals as a result thereof.

Respectfully submitted,

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APPENDIX.

Commonwealth of Pennsylvania
City of Philadelphia

Before me, the undersigned authority, personally came and appeared ALEXANDER D. IRWIN, who, being duly sworn, deposes and says:

That he is a member of the co-partnership of Irwin & Leighton one of the respondents in the case of United States ex rel Noland Company, Inc. v. Irwin & Leighton, et al., No. 658, October Term, 1941, Supreme Court of the United States.

That Cullen, Inc., plumbing subcontractor, named in petitioner's complaint in the District Court, (R. 2) was a subcontractor for Irwin & Leighton on three simultaneous and contemporary projects, namely:

Veterans Administration Facility, Bath, New York.
Howard University Library, Washington, D. C.
Bryn Mawr College Dormitory, Bryn Mawr, Pennsylvania.

That at about the time said projects were nearing completion Cullen, Inc., gave Irwin & Leighton assurances that the funds withheld by Irwin & Leighton for Cullen, Inc.'s account were more than sufficient to pay all of Cullen, Inc.'s indebtedness for labor and material on said three projects, but before Irwin & Leighton released said funds to Cullen, Inc., or for their account, they were put on notice of alleged indebtedness due by Cullen, Inc., to various persons for material supplied said projects for amounts far in excess of the amount retained by Irwin & Leighton for Cullen, Inc.'s account, which at the present time is as follows:

Bath, New York, project	$1,435.40
Howard University Library project	4,628.74
Bryn Mawr College project	7,228.90
Balance due Cullen, Inc.	$13,293.04

The claims which were filed with Irwin & Leighton by material men who had supplied Cullen, Inc., are as follows:

Bath, New York, project—

Sundry claims aggregating	$3,600.00

Bryn Mawr College project—

Claims filed in the Philadelphia Courts accompanied by attachments against the funds in the hands of Irwin & Leighton, by

James M. Castle, Inc.	$247.73
C. J. Rainear & Co., Inc.	924.04
U. S. Pipe and Foundry Co.	306.80
Penn Pipe & Hanger Co.	115.18
Plumbers Supply Company	1,107.76
Walter H. Tinney Company	1,768.00
Johnson Service Company	1,550.00
Noland Company, Inc.	10,513.73
American Blower Corporation	928.50
American Air Filter Company	500.00
The Cheney Company	545.07
Tuttle & Bailey, Inc.	475.00
Welding Engineers, Inc.	400.00

Howard University Library

Noland Company, Inc.	12,502.55
Englehaupt Company	4,140.14
Powers Regulator Co.	2,148.00
Total claims of creditors of Cullen, Inc.	$41,832.50

That Irwin & Leighton has valid reasons in believing that the sum of $12,502.55 claimed by Noland Company, Inc., as the balance due it by Cullen, Inc., on the Howard University Library project is much in excess of the actual sum due, if any; and that the sum of $10,513.73 claimed by Noland Company, Inc., on a confessed judgment note given it by Cullen, Inc., and purporting to be the balance due it

on the Bryn Mawr College project is much in excess of the actual sum due thereon, if any, and for said reasons Irwin & Leighton have a valid defense on the merits of said claims.

That Irwin & Leighton, as principals on the bonds furnished in connection with any of the above construction contracts are well able to pay and discharge any legal liability due to said creditors of Cullen, Inc., without said creditors resorting to the surety on said contract bonds; that said surety is, therefore, a mere nominal defendant in said suits without risk of payment of any of said claims in its capacity as guarantor.

(s) ALEXANDER D. IRWIN.

Sworn to and subscribed before me this 23 day of April, 1942.

(s) THOS. R. BAILEY,
Notary Public.

(Seal)

My Commission expires 8/2/42.

SUPREME COURT OF THE UNITED STATES.

No. 658.—October Term, 1941.

United States of America; to the Use of Noland Company, Incorporated, a Corporation, Petitioner, *vs.* Alexander D. Irwin and Archibald O. Leighton, Trading as Irwin and Leighton, and United States Guarantee Company, a Corporation.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[April 6, 1942.]

Mr. Justice Byrnes delivered the opinion of the Court.

By Act of February 14, 1931,[1] making appropriations for the Department of the Interior, Congress authorized the construction of a library building at Howard University in the District of Columbia. The cost was not to exceed $800,000, of which sum $400,000 was made immediately available. Only a small part of this money had been used for architects' fees when the President, shortly after his inauguration in 1933, ordered impounded these and all other funds appropriated for construction.

Title II of the National Industrial Recovery Act of June 16, 1933,[2] created a Federal Emergency Administration of Public Works, with all of its powers vested in an Administrator. By § 202 the Administrator was directed to "prepare a comprehensive program of public works, which shall include among other things the following: . . . (c) any project of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public; . . ." And § 203 provided that "with a view to increasing employment quickly . . . the President is authorized and empowered, through the Administrator or through such other agencies as he may designate or create, (1) to construct, finance, or aid in the construction or financing of any public works project included in the program prepared pursuant to § 202; . . ."

[1] 46 Stat. ~~115~~ 1115, 1160.

[2] 48 Stat. 195, 201.

On August 24, 1935, Congress passed the Miller Act.[3] By the terms of this statute, "before any contract, exceeding $2,000 in amount for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States . . . a payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the

[3] 49 Stat. 793; U. S. C., Title 40, §§ 270a-d:

"Sec. 1(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as 'contractor':

"(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

"(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

"(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

"(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

"Sec. 2(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under this Act and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by

use of each such person." The Act also permitted persons who supplied materials and labor to bring suit on the bond in the name of the United States.

These are the statutes applicable to this dispute.

After the passage of the National Industrial Recovery Act, the Secretary of the Interior (who had been named Administrator pursuant to Title II) approved the library building at Howard University as a part of the public works program and allotted $1,120,811.58 for its construction. On December 5, 1936 the Assistant Secretary of the Interior, on behalf of the United States, entered into a contract with respondent, Irwin & Leighton, for the construction of the library building. As a condition of the contract, Irwin & Leighton was required to furnish a bond to secure the laborers and material men, under provisions of the Miller Act.[4] Accordingly, it posted such a bond in the amount of $408,618, with respondent United States Guarantee Company as surety.

Petitioner furnished to a sub-contractor materials worth $23,649.35. Of this sum it was paid $11,146.80, leaving due $12,502.55 with interest. When payment of this amount was refused, petitioner brought this suit on the bond in the name of the United States. Respondents moved to dismiss the complaint on the ground that the construction of the library building at Howard University was not a "public work", within the meaning of the Miller Act. The District Court overruled the motion to dismiss. The Court of Appeals allowed a special appeal and reversed, on the authority of its own earlier decision in *Maiatico Construction Co.* v. *United States*, 79 F. 2d 418. The case is here on certiorari.

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mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

"(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit.

" . . . "

[4] Bulletin No. 51 of Federal Emergency Administration of Public Works, "Information Relating to the Negotiation and Administration of Contracts for Federal Projects under Title II of the National Industrial Recovery Act." (Revised, Oct. 1, 1935). Part I, § 2(a): "The forms required for general use in connection with construction and repair projects are as follows:

. . . U. S. Government Standard Form of Payment Bond No. 25A for the protection of labor and materialmen, pursuant to Public Act. No. 321, Seventy-fourth Congress, approved August 24, 1935 [The Miller Act]."

The question before us therefore is whether the construction of the library was a "public work" as that term is used in the Miller Act. We think that it is, that the Assistant Secretary of the Interior was consequently authorized to require respondents to post a bond securing materialmen, and that petitioner is entitled to sue on the bond in the name of the United States.

No aid in ascertaining the meaning of "public works" is to be found in the Miller Act itself. But in the National Industrial Recovery Act, passed two years before the Miller Act, Congress defined it as including "any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public." The library at Howard University was not only a project "*of the character* heretofore constructed or carried on . . . with public aid"; it had been directly and specifically authorized by Congress in 1931 and money had actually been appropriated for it. And it requires no discussion that Howard University, established by the authority of Congress "for the education of youth in the liberal arts and sciences,"[5] serves "the interests of the general public."

In *Maiatico Construction Co.* v. *United States, supra,* upon which the Court of Appeals principally relied in reaching an opposite conclusion, the same court had construed a different statute, the Heard Act of August 13, 1894.[6] That Act required that "any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required" to post a bond for the security of both the United States and the suppliers of labor and materials. It permitted the laborers and material men to enforce their claims by intervening in any suit by the United States on the bond. The plaintiffs in the *Maiatico* case supplied labor and materials in the construction of three dormitory buildings at Howard University, the contract for which had been let to the defendant construction company by the United States in November, 1930. The Court of Appeals decided that the plaintiffs could not recover on the defendant's bond because the dormitories were not "public buildings" and their construction was not a "public work." It based this conclusion on the theory that "public

5 14 Stat. 438.

6 28 Stat. 278, as amended by the Act of Feb. 24, 1905, 33 Stat. 811 and the Act of March 3, 1911, 36 Stat. 1167.

buildings" or "public works", within the meaning of the Heard Act, included only buildings which belonged to the United States. Since Howard University is a private institution and since it held title to the dormitories, recovery on the bond was denied to the suppliers of materials and labor.[7]

Whatever may have been the validity of this narrow formula when applied to the Heard Act, we cannot approve its application to this suit under the Miller Act. In the first place, the whole concept of "public works" has been considerably altered since the enactment of the Heard Act in 1894 and particularly within the last dozen years, and the question of title to the buildings or improvements or to the land on which they are situated is no longer of primary significance.[8] But we are not left to such vague guidance. Two and a half years after the execution of the contract involved in the *Maiatico* case, Congress, in the National Industrial Recovery Act, specifically defined "public works" as including "any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public." The Miller Act was passed two years later for the purpose of enlarging the protection which the Heard Act had afforded to laborers and materialmen by facilitating the procedure for enforcing their claims against the contractor. During the hearings on the several bills from which the Miller Act evolved, Congressman Duffy, of Ohio, the author of one of the bills and a member of the sub-committee that drafted the Act, declared without dissent by any Representative: "If this bill were passed by this Congress it would certainly be applicable to the public works program and that is the reason for its importance."[9]

We have no doubt that the Miller Act was intended to apply to the "public works" authorized by the Administrator under the National Industrial Recovery Act. The National Industrial Recovery Act did not leave to speculation the nature of the "public works" that Congress envisaged. Its language was not technical but plain and specific. Expressly included were "projects of the

[7] This emphasis upon title to the building or project or to the land on which it is situated finds support, as far as the Heard Act is concerned, in Guaranty & Trust Co. v. Crane Co., 219 U. S. 24; 23 Op. Atty. Gen. 174.

[8] See Peterson v. United States, 119 F. 2d 145, at 147-148.

[9] Hearings on H. R. 2068, H. R. 4027, H. R. 4231, H. R. 4461, H. R. 5054, H. R. 6018, H. R. 6115, H. R. 6677, H. R. 8519 (March 8, 22, April 26, and May 3, 1935), Committee on the Judiciary, House of Representatives, 74th Cong., 1st Sess., p. 71.

character heretofore constructed or carried on . . . . with public aid to serve the interests of the general public." Beyond question the library at Howard University was such a project.

The respondents evidently had no difficulty interpreting the language of the Recovery Act or the Miller Act until they were called upon to meet the claims of petitioner. The record does not reveal that Irwin & Leighton objected to posting the bond when the contract was executed. It paid a premium of $8,172.25 for the bond and the surety company accepted it without question. Presumably, these are the circumstances which caused the Court of Appeals to remark upon "the strong equities" of petitioner's case.

We hold that the Administrator had the authority to require the bond and that petitioner was entitled to bring this action on it. Holding this view, we find it unnecessary to consider the other questions raised by petitioner.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.